(27,511)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 756.

CITY OF SAN ANTONIO ET AL., APPELLANTS,

vs.

SAN ANTONIO PUBLIC SERVICE COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 4, 1920.

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1 & 2 *Caption.*

THE UNITED STATES OF AMERICA,
Western District of Texas:

Be it remembered, that at a regular term of the United States District Court in and for the Western District of Texas, the Honorable Du Val West, United States District Judge, presiding and holding its sessions at San Antonio, Texas, which term began on the 5th day of May, A. D. 1919, and continued in session to and including the 26th day of November, A. D. 1919, there came on to be heard and determined, among other causes pending on the docket, the following case:

Cause No. 214. In Equity.

THE SAN ANTONIO PUBLIC SERVICE COMPANY

vs.

CITY OF SAN ANTONIO and SAM C. BELL, Mayor; RAY LAMBERT, Louis Heuermann, Andres Coy and Phil Wright, City Commissioners, and R. J. McMillan, City Attorney.

3 In the United States District Court for the Western District of Texas, San Antonio Division.

No. 214. In Equity.

SAN ANTONIO PUBLIC SERVICE COMPANY

vs.

CITY OF SAN ANTONIO et al.

To the Honorable Judge of said Court:

Your petitioner, the San Antonio Public Service Company, complaining of the City of San Antonio and of Sam C. Bell, Mayor, Ray Lambert, Louis Heuermann, Andres Coy and Phil Wright, City Commissioners, and R. J. McMillan, City Attorney, shows:

1. That plaintiff is a private corporation duly incorporated under the laws of the State of Texas for the purpose of operating a street railway system and that it is engaged in operating a street railway system in the City of San Antonio, Bexar County, Texas, and has its principal office and domicile in said County and State and is a citizen of the State of Texas and of the United States. That the defendant City of San Antonio is a municipal corporation duly incorporated under the laws of Texas, and Sam C. Bell is the duly elected, qualified and acting Mayor of said City through whom service or citation may be had on said City, and that he resides in Bexar County, Texas.

That defendants, Ray Lambert, Louis Heuermann, Andres Coy and Phil Wright are the duly elected, qualified and acting City Commissioners of said City and together with the Mayor constitute the legislative body of said City authorized under its charter to pass and repeal ordinances in said City and having the general management of the affairs of said City and the power to enforce its laws and ordinances. That R. J. McMillan is the duly appointed, qualified and acting City Attorney of said City and as such is charged with the duty of bringing suits in the name of the City and of defending suits and acting as the legal representative of said City. That all of said defendants reside in Bexar County, Texas, and all are charged
4 with the duty of enforcing the ordinances of the City of San Antonio and particularly those hereinafter set out and referred to.

2. This is a suit of a civil nature involving more than Three Thousand ($3,000.00) Dollars exclusive of interest and costs, and arises under the Constitution and laws of the United States as hereinafter more fully shown.

3. Plaintiff further shows that heretofore, to wit, on or about the 16th day of March, A. D. 1899, the City of San Antonio acting by and through its City Council passed an ordinance extending the time of the franchises, rights and privileges to the San Antonio Gas Company, Mutual Electric Light Company, San Antonio Street Railway Company and the San Antonio Edison Company and fixing the time at which such rights, franchises and privileges should expire, which said ordinance was duly approved by the Mayor of said City and it is in words and figures as follows, to wit:

"An ordinance granting an extension of time, and fixing the date at which the rights, privileges and franchises of the San Antonio Gas Company, Mutual Electric Light Company, San Antonio Street Railway Company and the San Antonio Edison Company shall expire, and imposing conditions and limitations upon the exercise of said rights, privileges and franchises.

"Be it ordained by the City Council of the City of San Antonio that:

Section 1. The rights, privileges and franchises heretofore granted to and existing in the San Antonio Gas Company, Mutual Electric Light Company, San Antonio Street Railway Company and the San Antonio Edison Company shall be and are hereby extended from this date so that the rights, privileges and franchises of said companies shall exist until and shall expire on the first day of July A. D. 1940. Said extension of time is granted to said Companies upon the following terms and conditions, to-wit:

1st. The said Antonio Gas Company shall not, after their acceptance of the extension hereby granted, charge for gas more than $2.00 per 1,000 cu. ft., when used for illuminating purposes, and not more than $1.50 per 1,000 cu. ft. when used for fuel purposes,

and shall allow consumers a discount of 25% per 1,000 cu. ft. from said prices for payment at the Company's office on or before the 10th day of each month following that in which the gas is consumed.

2nd. Said San Antonio Gas Company and said Mutual Electric Light Company shall not, after their acceptance of the extension hereby granted, charge for electricity, for illuminating purposes, more than twenty cents (20c.) per 1,000 watts, or for power purposes more than 6c. per 1,000 watts, with a discount of 10% from said prices for payment at the Company's office on or before the 10th day of each month following that in which the electricity is consumed.

5 3rd. Said San Antonio Gas Company and said Mutual Electric Light Company shall not, after their acceptance of the extension hereby granted, charge a rental for the meters used in measuring gas or electricity, when the gas or electricity consumed monthly amounts to more than 50c.

4th. Said San Antonio Street Railway Company and said San Antonio Edison Company shall, after their acceptance of the extension hereby granted, pave all tracks between the rails, and all the space between double tracks, and twelve inches (12") on the outside of their tracks, on any streets occupied by them, or either of them, which shall hereafter be paved by the City, as and when the City paves and with the same material as used by the City, and shall keep the same in reasonable repair and in like conditions as the City keeps adjoining streets.

That said street railway companies shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other.

Section II. The rights, privileges and franchises, or either of them, herein referred to and hereby extended, may be assigned by the grantee or grantees to any person or corporation, but the conditions and limitations of this Ordinance shall apply to the assignees thereof.

Section III. Said Mutual Electric Light Company agrees to furnish the City of San Antonio, and said City agrees to take for five (5) years from June 1st, 1899, two hundred and fifty (250) electric arc lights of 500 watts capacity, for lighting its streets, parks and highways, with the privilege to said City of increasing the said number of arc lights to the number of five hundred (500) during said term, said arc lights to burn on the moonlight schedule, at ninety dollars ($90.00) per lamp per year, the form and minor details of said contract to be mutually agreed upon.

The City reserves the right to renew this contract for ten (10) years after the expiration of this contract, upon the same price, terms and conditions.

Said Company also agrees to furnish incandescent electricity to said City for lighting its buildings at a rate not to exceed ten cents (10c.) per 1,000 watts, which equals 1½c. per ampere hour.

Section IV. Said Companies, or either of them, or their assigns, shall file with the City Clerk on or before the first day of May, A. D., 1899, its or their written acceptance of the terms and conditions of this Ordinance; otherwise this ordinance shall have no force or effect.

Section V. Said Companies shall be subject to all Ordinances of this City, except in so far as such Ordinances conflict herewith."

That at the time of the passage of said ordinance the charter of the City of San Antonio granted to it by the Legislature of the State of Texas and then in force, contained these provisions:

"Be it enacted by the legislature of the States of Texas:
That all inhabitants of the City of San Antonio are hereby constituted a body corporate and politic, and shall have power: * * *.

Sec. 99. To direct and control the laying and construction of railroad tracks, turnouts and switches, or prohibit the same in the streets, avenues and alleys, and location of depot grounds within the city; to require that railroad tracks, turnouts and switches shall
6 be so constructed as to interfere as little as possible with the ordinary travel and use of the streets, avenues and alleys, and that sufficient space shall be left on either side of said tracks for the safe and convenient passage of teams, carriages and other vehicles and persons; to require railroad companies to keep in repair the streets, avenues or alleys through which their track may run, and if ordered by the city council to light the same and to construct and keep in repair suitable crossings at the intersections of streets, avenues and alleys, and ditches, sewers and culverts, when the city council shall deem necessary; to direct the use and regulate the speed of locomotive engines within said city or prevent or prohibit the use or running of the same within the city.

Sec. 100. Exclusively to prevent control and regulate everything connected with city railroads, and to make such rules and regulations for the same as the city council may deem necessary."

That no authority respecting said matters other than that contained in said Sections 99 and 100 had been granted the City by the Legislature of Texas, and it had no authority to make a contract as to fares.

That the provision of said ordinance above set out relative to charging a "five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other," was not intended by the parties as anything more than a mere regulation of the rate for the time being and as fixing a rate of fare that was deemed just and reasonable under the circumstances and conditions existing at that time and was never intended as a contract; but plaintiff says that if it was intended as a contract, then, (1) The City had never been authorized by the Legislature of the State of Texas to make any such contract and had no power to make such a contract, (2) Said provision, if intended as a contract, was illegal and void because it was forbidden and prohibited by Section 7, Art.

1, of the Bill of Rights in the Constitution of the State of Texas, which provides that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof."

Said provision, if intended as a contract, was also illegal and void because contrary to public policy and was one calculated to deprive a public service corporation, under conditions that might thereafter arise, of its ability to render adequate service to the public, and same was an attempt to barter away the police power of the State and City with reference to regulating rates.

7 4. That thereafter, to-wit, on or about the 4th day of April, A. D. 1900, the San Antonio Traction Company, a corporation duly incorporated under the laws of Texas, became the owner of all the rights, privileges and franchises of every kind and character conferred upon the San Antonio Street Railway Company by the terms of said ordinance and thereby became subject to the legal obligations therein imposed and thereafter on or about the 1st day of July, A. D. 1917, your petitioner, the San Antonio Public Service Company, by and with the consent of the City Council of said City, became the owner of all said rights, privileges and franchises granted under said ordinance and is still such owner.

5. For many years prior to July, A. D. 1917, the San Antonio Traction Company was engaged in operating a street railway system in and upon the streets of the City of San Antonio and in the course of said operation and as authorized by the ordinance hereinbefore referred to, had invested large sums of money and had constructed a large and expensive plant, all of which was necessary for the purpose of said business, and on the said first day of July, A. D. 1917, your petitioner became the owner of all the property and plant belonging to the said San Antonio Traction Company and is now the owner thereof and that all said plant is used for the purpose of operating a street railway system in the City of San Antonio and its suburbs and of giving the public adequate service.

That the reasonable value of said plant aggregates in excess of $5,270,000.00. That the City of San Antonio has fixed a value of $821,770.00 on the franchise granted to the San Antonio Street Railway Company and now owned by this plaintiff and assesses it each year for taxes for said sum and compels this plaintiff to pay taxes thereon on said valuation and the plaintiff is entitled to have said franchise valued for at least said sum and the same should be included as a part of the value of its properties on which it is entitled to earn a fair return and with said value added plain-

8 tiff alleges that the total amount of its investment and the value of its properties exceed $6,091,000.

6. Plaintiff would further show at the time of the passage of the ordinance hereinbefore set out, to-wit, March 16th, A. D. 1899, the five cents fare therein referred to was sufficient under the con-

ditions then existing to pay operating expenses and a fair return on the investment and properties of said Company that were necessary to the operating of said Street Railway and to give the public an adequate service and to comply with the terms of said ordinance. Petitioner further shows, however, that since the beginning of the European War in 1914, the cost of labor and material and of all supplies necessary for the operation of said street railway business have very greatly increased and have thereby caused its operating expenses to increase far beyond the proportion in which its gross receipts have increased and because of such increase in operating expenses this plaintiff has reached the point where it is unable to operate said properties under a five cents fare so as to pay the operating expenses and any fair return on its investment. That during the year ending September 30, A. D. 1918, the operating expenses of the Traction Department of this Company, exclusive of any interest on its bonds or other indebtedness aggregated $1,434,960.98; that its gross receipts aggregated $1,603,596.59 and the net return was therefore only $168,635.61, or a return of only 3.2% on its investment, or only 2.77% on the investment with value of franchise included, which is not a fair return under the law and plaintiff shows that under the law it should be allowed to earn a return of 10% on its investment or the value of its properties, which said percentage would be a fair return.

Petitioner further shows that since the beginning of the year ending September 30, A. D. 1918, above referred to, the cost of labor and material have greatly increased and under the present prices of labor and material its gross operating expenses for the year ending September 30, A. D. 1919, will aggregate $1,656,-
9 000. That there is no probability that said cost of labor and material will be decreased, but on the contrary, the probabilities are that they will be increased above said amounts, and in truth and in fact plaintiff now has a demand from its employes for an increase in wages which, if granted, will aggregate an additional sum of approximately $158,000. That there is no reason to believe that the gross receipts will be greater than those during the year ending September 30, A. D. 1918, but on the contrary, the probabilities are that said receipts will be decreased on account of the termination of the war and the fewer number of soldiers in the army camps of the city of San Antonio and its vicinity.

7. That under the existing prices of labor and material plaintiff will not be able, under a five cents fare, to earn more than its operating expenses for the coming year, exclusive of any interest on bonds or other indebtedness, and it is very doubtful whether it will be able to earn said operating expenses, and it is certain that it will not be able to earn any fair return on its investment or the value of its property during said year. That if it shall be compelled to further increase the wages of its employes, its operating expenses will far exceed its revenues. That it is not now earning sufficient

to pay any fair return on its investment but is operating its properties at a great loss without any fair return thereon and in order to earn any fair return on its investment it is necessary for this plaintiff to increase the rate of fare to be charged to passengers to at least seven cents per adult passenger for each continuous ride over its lines with transfer to its other lines.

8. That after the passage of the ordinance of March 16th, A. D. 1899, hereinbefore set out, the Legislature of the State of Texas in 1903 passed what is commonly known as the half fare law which was duly approved and became a law of this State and which requires street railway companies to carry children of the age of 12 years or less at, and for half, the charge of fare regularly collected for adult persons and to carry students under 17 years of age in actual attendance upon any academic, public or private school, of grades not higher than the grades of the public high schools of this state, situated within or adjacent to, the town or city in which such street railway company is located at one-half the fare charged adult persons and imposes penalties for the violation of said statute, which said act is now a part of the Penal Code of 1911, Article 1570-1575 inclusive, and said act further requires that all children under five (5) years of age should be carried free of charge.

Your petitioner shows that its predecessor, the San Antonio Traction Company, contested the validity of said law on the ground that, by virtue of said franchise ordinance of March 16th, 1899, it had a contract with the City of San Antonio giving it a right to charge a five cents fare to all persons whether children or adults. That a citizen of San Antonio, George C. Altgelt, brought suit in the District Court of Bexar County, Texas, to compel the San Antonio Traction Company to carry children and students at half fare in accordance with the terms of said statute and the said San Antonio Traction Company in said suit set up the specific terms of said ordinance hereinbefore set out, to-wit:

"That said Street Railway Company shall charge five cents for one continuous ride over any one of their lines, with one transfer to or from either line to the other,"

and claimed that by the terms of said ordinance and franchise it had a contract by which it was permitted to charge a five cents fare to all persons whether children or adults. Said suit was tried in the District Court and then appealed to the Court of Civil Appeals for the Fourth Supreme District of Texas, and thereafter application was made bb the San Antonio Traction Company for writ of error to the Supreme Court of this State, which was by said Court denied and said case was then carried by said Company to the Supreme Court of the United States and the contention made by the said San Antonio Traction Company was denied by each and all of said courts and it was held that by the constitution and laws of this state the

said provisions of said franchise ordinance did not consti-
11 tute a binding contract and that the Legislature had the power and authority to pass said law and said law went into effect and this plaintiff's predecessor, San Antonio Traction Company, as well as itself, have been compelled to obey the same and for that reason have been unable to charge or collect a five cents fare as referred to in said ordinance and by reason thereof the two companies during said years of its enforcement have lost about $500,000.00, and is annually losing about $35,000.00 by reason thereof.

In this connection, plaintiff further shows that said provisions of said ordinance did not and do not constitute a contract limiting the rate of fare to be charged by this Company to five cents, but was only intended by the City and the Company as fixing what was at that time regarded as a reasonable fare; but, if it be held that it was intended to be a binding contract, then it was beyond the power of the City or the Company to make any such contract for the reason that the fixing of rates was a matter within the police power of the City and State of Texas and which the City had no right to contract away under the constitution and laws of this State, and further that even if it was at that time a binding contract it was repealed, annulled and abrogated by the half-fare law passed by the Legislature in 1903, hereinbefore set out, which changed the terms of such contract, and neither the City nor the Company have acted thereunder since that date.

9. Plaintiff further shows that after the passage of the ordinance of March 16th, 1899, above set out, the City of San Antonio through its duly authorized City Council, to-wit, on November 17, 1903, passed what is known as the Half-Fare Ordinance by the terms of which street railway companies in San Antonio were required to carry all school children under twelve (12) years of age for 2½ cents and all students under seventeen (17) years of age in school attendance in the public or private schools in the City of San Antonio, at and for a fare of 2½ cents. Said ordinance provided for issuance of tickets and imposed penalties for violation thereof. A copy of it is hereto attached and marked "Exhibit C" and made a part hereof and reference is made thereto for a more particular description thereof. And the plaintiff further shows that in the passage
12 of said ordinance and by its terms the said City of San Antonio specially recognized and ratified the Half Fare Law passed by the State of Texas and sought to enforce the terms thereof and specifically required street railway companies to sell tickets at the same rate "and in conformity with Chapter 146 of the General Laws of Texas, Acts of the Twenty-eighth Legislature", said chapter being the Half Fare Law above referred to, and thereby ratified said law and adopted it as the act of the City of San Antonio. That plaintiff's predecessor, San Antonio Traction Company, was the only street railway company operating in San Antonio at that time and said ordinance was intended to and did apply to it and has applied to this plaintiff since it purchased said property in July, 1917.

Plaintiff further shows that on or about the 24th day of June, 1907, the said City of San Antonio by and through its duly authorized City Council passed an ordinance requiring street railway companies to carry free of charge all persons serving in the Police and Fire Department while on duty and in uniform, or provided with the proper written authority from the City Marshal or Chief of the Fire Department. A copy of this ordinance is hereto attached and marked "Exhibit D" and made a part hereof and referred to for more complete description thereof.

That plaintiff and its predecessor, the San Antonio Traction Company, have been compelled to and have complied with the terms of said Half Fare Ordinance ever since its contention that the five cents fare provision in the ordinance of March 16, 1899, was a binding contract was denied by the Courts, to its great loss as hereinbefore set out; and plaintiff further shows that it and said predecessor have also been compelled to and have complied with the terms of the ordinance above referred to requiring the free transportation of policemen and firemen to its great loss in the sum of many thousands of dollars.

13 10. Plaintiff further shows that if the City of San Antonio ever intended the five cents fare provision contained in the franchise ordinance of March 16th, 1899, as a binding contract, (which is not admitted but denied), then the said City by its act in passing and enforcing the Half Fare Ordinance above referred to and in passing and enforcing the ordinance above referred to requiring the free transportation of policemen and firemen, and by its acts in recognizing the validity of and assisting in the enforcement of the Half Fare Law passed by the State of Texas, above referred to, and by ratifying and adopting same and by each of said acts, and by various other acts subsequent to the passage of the ordinance of March 16th, 1899, has repealed, abrogated and annulled said five cents fare provision in said ordinance and has long since recognized that it was no longer a binding provision in said ordinance and neither the said City nor this plaintiff nor its predecessor, the San Antonio Traction Company, has treated or regarded said provision as a binding contract since the final decision by the Courts in the Altgelt case above referred to and the said City is now estopped by reason of each and all of its said acts from claiming that said provision is binding on this plaintiff so as to prevent it from increasing its rate of fares to such point as will pay its operating expenses and a fair return on its investment.

11. Your petitioner further shows that heretofore, to-wit, on or about the 28 day of March, A. D., 1918, the Mayor and City Commissioners passed an ordinance prohibiting any public utility company operating in the City from raising its rates without first applying to and obtaining consent of the Mayor and Commissioners of the City of San Antonio, a copy of said ordinance being hereto attached and marked "Exhibit A" and made a part hereof and referred to for a more complete description thereof.

12. That heretofore, to-wit, on August 29th, 1918, your petitioner finding that a five cents fare was not sufficient to pay its operating expenses and a fair return on its investment, in obedience to the terms of said ordinance just referred to and because thereof, applied
14 to the Mayor and Commissioners of the *of the* City of San Antonio for permission to change the rate of fare and have it fixed by the City Commissioners at six (6¢) cents. That said Commissioners set down said application for hearing and that thereafter evidence was introduced thereon and same was fully heard by said Mayor and Commissioners and the undisputed evidence on said hearing showed that a five cents fare was not sufficient to enable plaintiff to earn a fair return on its investment or the value of its properties, but notwithstanding the fact that said undisputed evidence so showed, the said Mayor and Commissioners arbitrarily denied said application and in denying it passed another ordinance prohibiting this plaintiff from raising said rate of fare from five cents and providing sever- penalties and a forfeiture of its charter if it should attempt to do so. That a copy of said ordinance is hereto attached and marked "Exhibit B" and made a part hereof and referred to for a more complete description thereof.

13. That thereafter, to wit, on the — day of October, 1918, your petitioner applied for a re-hearing of said application for an increase in such rates and after considering said motion it was denied and the said city has finally arbitrarily declined and refused to permit this plaintiff to raise said rates and has passed the ordinance hereinabove referred to and set out in "Exhibits A and B" hereto attached and the same are now in full force in said City. That each of said acts of the Mayor and Commissioners in denying petitioner the right to raise said rates were arbitrary and unreasonable and without evidence to support them and contrary to the undisputed evidence introduced on said hearing and without warrant in law or equity. That in passing and enforcing each of the said ordinances above referred to and set out in "Exhibits A and B" and in denying plaintiff permission to raise its said fares, and in prohibiting it from doing so, the said defendants were asserting the right to so act as a municipal corporation and were asserting their authority to act under and by virtue of the laws of the State of Texas as an agency and representative of said State.

14. That, if your petitioner should raise the rate of fare to
15 be charged by it for carrying passengers on its street railway above five cents, the said City and its Commissioners and City Attorney will undertake to forfeit its franchise and to impose the penalties provided for in said ordinance and by various other methods will undertake to prevent its doing so and will seriously interfere with and harrass it in the operation of its properties and will subject it to numerous and divers suits and prosecutions for penalties and forfeitures and will undertake to forfeit its charter and cast a cloud upon its right to operate said street railway system; and will institute numerous prosecutions against its officials to enforce penalties under said ordinance, all of which will materially injure if not de-

stroy the credit of this plaintiff and will materially interfere with its performing its duty to the public and rendering adequate service to the public of San Antonio and will materially interfere with it in the operation of its plant and cause it serious and irreparable injury and damage for which it will have no adequate remedy at law.

Plaintiff desires now to raise the rate of fare to be charged to passengers to seven (7¢) cents per passenger for adults and to one-half that amount for the persons required by the State Half Fare Law to be carried at half fare or to such other sum as the Court may find will be necessary in order for it to earn its operating expenses and a fair return on its investment, but it is unable to do so because of said ordinances and of the threatened injury and damage by the City and its Commissioners as hereinbefore set out, which is all that prevents plaintiff from at once so raising its said rates.

15. Plaintiff shows that said ordinances are contrary to the Constitution of the United States and void in so far as they interfere with and prohibit it from raising its rates of fare to such a point as will enable it to earn its operating expenses and a fair return on its investment, and the enforcement thereof will deprive this plaintiff of its property without due process by law in violation of the constitution and laws of this State and of the United States
16 and particularly in violation of that portion of Section One of the Fourteenth Amendment to the Constitution of the United States which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States. Nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws." And also in violation of that portion of the Fifth amendment to the Constitution of the United States which provides that no person shall be "deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

Plaintiff further shows that in addition to its said Traction Department it owns and operates a Gas and Electric Department, which is engaged in supplying gas and electricity to the City and people of San Antonio and its suburbs. That formerly the Traction business in said City was owned and operated by one Company and the Gas and Electric business by another company, and on or about the first day of July, 1917, the City of San Antonio by ordinance duly passed permitted plaintiff to acquire and thereafter operate the properties of both concerns; but said permission was granted on condition that plaintiff should keep said departments separate, and keep the books of each department separate, and, that notwithstanding its assent to the assignment of the franchises and properties of both companies to this plaintiff, the City should nevertheless have the right in fixing rates of gas and electricity to do so separately and independently of the matter of earnings or profits or losses on the investments of the company in the Traction business. Therefore, this plaintiff would not be entitled under said ordinance and regulations of the City of San Antonio to recoup any of its losses in the Traction Department from any earnings or profits it might have in

the Gas and Electric Department. However, this plaintiff alleges the fact to be, that, even if it should be held that the earnings of all departments should be considered as a whole in fixing rates, its
17 earnings in the Gas and Electric Department are not sufficient to furnish a fair return on plaintiff's investment in that department and its earnings in both departments are not sufficient to furnish a fair return on its total investment therein. That it has no income except from the departments above mentioned.

Wherefore, plaintiff prays that the defendants be subpœnaed as required by law and that pending this suit a preliminary injunction issue restraining the defendants, and each of them, from enforcing the said ordinance hereinbefore above referred to, copies of which are attached hereto and marked "Exhibits A & B," and from interfering with plaintiff in any way in putting into force and effect a seven cents fare for adults and one-half that amount for the classes of persons required by the State Half Fare Law to be carried for half fare, or such other fare as the court may find is necessary to enable plaintiff to pay its operating expenses and a fair return on its investment and that on final hearing the court determine whether or not a seven cents fare is necessary in order for plaintiff to earn its operating expenses and a fair return on its investment and if not, then what rate of fare is necessary for that purpose and that it enter an order and decree perpetually enjoining the defendants, and each of them, from enforcing the said ordinances above referred to, copies of which are hereto attached and marked "Exhibits A & B," and from interfering with plaintiff in fixing and establishing the said rate of fare so found by the court to be reasonably necessary for the purpose of enabling this plaintiff to earn its operating expenses and to pay a fair return on its investment or the value of its properties and plaintiff further prays for costs and general relief.

TEMPLETON, BROOKS, NAPIER & OGDEN,
HOWARD TEMPLETON,
S. J. BROOKS,
WALTER P. NAPIER,
Solicitors for Plaintiff, San Antonio Public Service Company.

STATE OF TEXAS.
County of Bexar:

Before me, the undersigned authority, on this day personally appeared E. H. Kifer, who being by me duly sworn, deposes and says that he is the Second Vice-President and General Manager of the San Antonio Public Service Company, and that the facts
18 stated in the foregoing bill of complaint are within the knowledge of affiant true, except where stated on information and belief and that as to said facts he believes them to be true.

E. H. KIFER.

Subscribed and sworn to, before me, this the 27th day of November, A. D. 1918.

[SEAL.]

C. PHILIPPI,
Notary Public in and for Bexar County, Texas.

EXHIBIT A.

An ordinance, March 28, 1918, forbidding an increase in the rates to the public by a public service corporation enjoying any franchise or public right or privilege within the City of San Antonio or engaged in the conduct of any public utility business therein, without the permission of the Mayor and Commissioners of the City of San Antonio, providing for a hearing for the purpose of establishing a fair rate, denouncing a penalty, providing for certain forfeitures, etc.

Be it ordained by the commissioners of the City of San Antonio:

Section 1. It shall hereafter be unlawful for any person, firm, corporation or association, their agents, servants or employes, engaged in the business of furnishing local telephone service to the public within the limits of the City of San Antonio, or for any person, firm, corporation or association, their agent, servants or employes, exercising or enjoying any public franchise or privilege under or in the City of San Antonio, to charge or collect for the local service rendered by them to the public in the City of San Antonio any higher rate than the rates now in existence and charged and collected at this time, without first filing an application for such increase and securing the approval thereof by the Mayor and Commissioners of the city of San Antonio after an open hearing, as hereinafter provided.

Section 2. In the event any such person, firm, association or corporation mentioned in section 1 hereof shall desire to increase the charges at this time existing for such service, they shall, prior to attempting such increase, file with the Mayor of the city
19 their application setting out in detail the rates by them proposed to be charged and the reasons for such increase and request a hearing.

Section 3. Upon the filing of such application, the Mayor and Commissioners shall at the next succeeding regular meeting of the Commissioners set a date for such hearing to begin, which date shall not be later than ten days thereafter, and notice of said date shall be given to the petitioner. Upon such hearing, which shall be held by the Mayor and Commissioners in open meeting, petitioner shall have the right and it shall be its duty to produce such documents, books, records, accounts and other evidence as may be necessary to enable the Mayor and Commissioners to pass intelligently and fairly upon the reasonableness of the proposed rates and the Mayor and Commissioners shall have the right and authority to call for or introduce any books, records, documents, accounts or other evidence which might assist in arriving at the proper determination of the issues involved.

Section 4. Said hearing shall be expeditiously conducted, and at the termination thereof the Board of Commissioners shall, within five days thereafter, either grant or refuse said increase, or partially grant same, or lower the existing rates, as the merits of the case may re-

quire; and it shall be unlawful for any such person, firm, corporation or association, their agents, servants or employes, to charge or attempt to charge any rates for local service within the City of San Antonio higher than that so fixed by the Board of Commissioners; and any such increased rate so made without permission shall be void and uncollectible; and no such person, firm, corporation or association, their agents, servants and employes, shall discontinue or refuse to furnish service to the public because of the failure or refusal of the public to pay a higher rate than the one so fixed by the Board of Commissioners.

Section 5. Any person, firm, corporation or association, or any agent, servant or employe thereof, who shall violate any of the provisions of this ordinance, shall be guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than one ($1.00) dollar nor more than twenty-five ($25.00) dollars, and each separate charge or collection of any increased rate without the permission of the Board of Commissioners shall constitute a separate offense.

Section 6. Any person, firm, association or corporation enjoying any public franchise within the limits of the City of San Antonio or holding any public privilege or right to render public service for profit within the City of San Antonio or rendering any public utility service within said city, who shall violate the provisions of this ordinance, or who shall increase the rates charged the public in violation hereof, shall subject itself to a forfeiture of such franchise rights, if any it may have, and the same may be forfeited by the Board of Commissioners of the City of San Antonio after ten days' notice to the holder of such franchise rights; and any such person, firm, corporation or association who, with or without franchise, shall in the City of San Antonio fail or refuse to comply with the provisions of this ordinance shall not be allowed or permitted to continue the operation of the business in which they are engaged within said city, and shall be, upon order of the Board of Commissioners, by the Police Department restrained and prevented from so doing.

Section 7. Should any part or portion of this ordinance for any reason be held invalid, such holding shall in no way affect the remainder of said ordinance, which shall, on the contrary, remain in full force and effect.

Section 8. This ordinance being of urgent public importance by reason of facts apparent upon the face hereof, and being necessary for the immediate preservation of the public welfare and safety, shall be and become effective from and immediately after its passage and approval.

EXHIBIT B.

An ordinance denying the application of the San Antonio Public Service Company for an increase of rates and fares in its Traction Department and fixing the fares to be charged within the corporate

limits of the City of San Antonio for Street Railway Transportation, providing a penalty, and declaring an emergency.

* * * * * * *

The San Antonio Public Service Company, on the 29th day of August, 1918, in accordance with the ordinances of the City, filed an application for an increase in rates and fares in its Traction Department and requested a hearing. The Commissioners of the City of San Antonio, at their next regular meeting, granted said application for a hearing, and said hearing was set for Thursday, Septem-
21 ber 12th, 1918, at which time same was, in the City Council Chamber, begun and continued, with various adjournments, until Wednesday, October 2nd, 1918, when said hearing was concluded and adjourned.

The Commissioners of the City of San Antonio find that the petitioners, under a forty-year franchise previously secured from the City of San Antonio, agreed to "charge a five cent fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other", which agreement upon the part of the street railway company this Commission does not consider itself authorized nor called upon to set aside.

The Commission is further of the opinion, from the facts that have been introduced in evidence and from the investigation it has made, that an increase of fares to be charged for street-car service in the limits of the City of San Antonio is, irrespective of the franchise agreement, not warranted under the conditions existent at this time: therefore,

Be it ordained by the Commissioners of the City of San Antonio:

Section 1. That the application of the San Antonio Public Service Company for an increase of rates and fares in its Traction Department, filed on August 29th, 1918, be and the same is hereby in all things refused and denied.

Section 2. That no person, firm or corporation, owning, leasing or operating any line or lines of street railway within or partially within the City of San Antonio, nor any agent, servant or employee of such person, firm or corporation, shall charge a fare in excess of five (5¢) cents for one continuous ride over any one of their lines, with one transfer to or from either line to the other within the corporate limits of the City of San Antonio.

Section 3. Any person, firm or corporation, or any servant, agent, employee or officer thereof who shall violate any provisions of this ordinance shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum of not less than one ($1.00) dollar nor more than Twenty-five ($25.00) Dollars, and each separate charge or collection of any fare in excess of that provided for herein, or refusal to give transfer as provided for herein, shall constitute a separate offense.

Section 4. Any person, firm, association or corporation enjoying any public franchise within the limits of the City of San
22 Antonio, or holding any public privilege or right to render public service for profit within the City, who shall willfully violate the provisions of this ordinance or who shall increase the rates charged the public in violation hereof, shall subject itself to a forfeiture of such franchise rights, if any it may have, and the same may be forfeited by the Board of Commissioners of the City of San Antonio upon such grounds, after ten days' notice to the holder of such franchise rights.

Section 5. All ordinances and parts of ordinances in conflict herewith are hereby repealed.

Section 6. This ordinance, being of urgent public importance by reason of facts apparent upon the face thereof and being necessary for the immediate preservation of public welfare and safety, shall be and become effective from and immediately after its passage and approval.

Passed and approved, this —— day of October, A. D. 1918.

——— ———,
Mayor of the City of San Antonio.

Approved:

——— ———
City Clerk.

EXHIBIT C.

An Ordinance Amending Chapter 49 of the Revised Criminal Ordinances Regulating Fares to be Charged on Street Railways.

Be it ordained by the City Council of the City of San Antonio: That Section 20 of Article 49 of the Revised Criminal Ordinances of the City of San Antonio be amended to read as follows (after the last word section):

Provided further, that it shall be the duty of such person, firm or corporation, owning or operating said line, to carry school children of the age of 12 years or under, at and for two and one-half (2½) cents for each school child, in actual attendance in the Public or private schools situated within the limits of the City of San Antonio, during the scholastic term.

Provided further, that the corporation owning or operating said line shall provide for the sale of tickets in lots of not less than twenty (20) each ticket to be good for one trip over the
23 lines operated, said tickets to be sold at the rate of 2½ cents each, and provided further, that said tickets cannot be used by the holder thereof except in going to and returning from the school in which such child or children are in attendance.

Provided further, that said corporation shall sell said tickets at the same rate to students under the age of 17 years in actual attendance upon any academic public or private school, and in conformity with chapter 146 of the General Laws of Texas, Acts of the 28th Legislature.

Provided further, that any person or persons violating any provision of this section, shall upon conviction before the Recorder be adjudged guilty of a misdemeanor and fined in any sum not less than $25.00 and not more than $100.00.

Passed November 16th, 1903, and approved November 17th, 1903.

JOHN P. CAMPBELL,
Mayor.

Attest:
GEORGE F. STUEMKE,
City Clerk.

EXHIBIT D.

An Ordinance.

An Ordinance Requiring Owners and Operators of Street Railways to Carry Free of Charge All Persons Serving in the Police and Fire Departments While on Duty.

Be it ordained by the City Council of the City of San Antonio:

Section I. It shall be the duty of every person or corporation owning or operating any street railways upon, across or along any public street, avenue, plaza or square of the City to transport and carry, free of charge, all persons serving in the Police and Fire Department while on duty and in uniform, or provided with the proper written authority from the City Marshal or Chief of the Fire Department.

Section II. Any Street Railway Company or agent or employee of such Company who shall violate Section I hereof shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than five dollars nor more than two hundred dollars, and each refusal to so carry or transport shall be deemed a separate offense.

Endorsed: In Equity, No. 214. San Antonio Public Service Company vs. City of San Antonio, et al. Bill of Complaint. Filed November 27th, 1918. D. H. Hart, Clerk, by A. I. Campbell, Deputy. Templeton, Brooks, Napier & Ogden, Solicitors for San Antonio Public Service Co.

24 In the United States District Court for the Western District of Texas, San Antonio Division.

No. 214. In Equity.

SAN ANTONIO PUBLIC SERVICE COMPANY

vs.

CITY OF SAN ANTONIO et al.

Now comes the plaintiff the San Antonio Public Service Company and with leave of the Court files this supplemental bill and sup-

plementing the original bill filed herein as permitted by equity rule No. 34, says:

That since the filing of the original bill plaintiff's operating expenses have been further increased by reason of the fact that it has been compelled to raise the wages of its employes, particularly the operators of its cars and that the additional gross operating expenses by reason of said raise in wages, which said raise took effect April 1, 1919, will amount to approximately One Hundred, Seventy Five Thousand ($175,000.00) Dollars per year and will increase its operating expenses to that extent.

TEMPLETON, BROOKS, NAPIER & OGDEN,
Attorneys for Plaintiff.

Endorsed: No. 214. In Equity. San Antonio Public Service Co. vs. City of San Antonio et al. Plaintiff's Supplemental Bill. Filed May 5th, 1919. D. H. Hart, Clerk, by A. I. Campbell, Deputy.

25 In the United States District Court, Western District of Texas, San Antonio Division.

No. 214. *Equity.*

SAN ANTONIO PUBLIC SERVICE CO.

vs.

CITY OF SAN ANTONIO et al.

Now comes the plaintiff and with the consent of the defendants files this its first amendment to its original bill filed herein and amended said bill by adding thereto Section number sixteen as follows:

16. Plaintiff further shows that Section 20, of Chapter 47, of the Revised Criminal Ordinances of San Antonio also prohibits the charging of more than five cents per passenger on street railway lines within the City of San Antonio, between the hours of six A. M. and twelve midnight, and not over ten cents after that hour, and also requires the giving of transfers and regulates them. Section 64 of said Chapter provides a penalty for the violation of that ordinance in a fine of not less than twenty-five Dollars, ($25.00), nor more than two hundred dollars ($200.00), against the various officers and employees named therein. A copy of said Section 20, and of Section 64 is hereto attached and marked Exhibit "D." Plaintiff believes that said ordinance was in fact repealed by the ordinance passed by the City Council of said City on the — day of ——, 1918, copy of which is attached to plaintiff's original bill and marked Exhibit "B," but if the ordinance set out in Exhibit "D" shall be enjoined, plaintiff believes and fears that the Defendants will take the position that a portion of the ordinance herein referred to in Exhibit "D" is still in force and will undertake to enforce the pen-

ance provided for the violation thereof against its officers and employees and will attempt to subject them to penalties therein for each fare charged above five cents which will seriously interfere with plaintiff in the operation of its street railway system and will subject it to great and irreparable damage for which it has no adequate remedy at law, and plaintiff prays that defendants be also enjoined from enforcing this ordinance or any other ordinance or regulation referred to herein or in plaintiff's original bill that will prevent this plaintiff from raising its rate of fare to such point as will enable it to realize a fair return on the value of the property.

And by adding thereto exhibit "D," which is attached hereto.

TEMPLETON, BROOKS, NAPIER & OGDEN,
S. J. BROOKS,
HOWARD TEMPLETON,
W. F. NAPIER,
LEO BREWER,
Solicitors for Plaintiff.

EXHIBIT "D."

Sec. 20. No person, firm or corporation, owning or operating any line or lines of street railway, either within or partly within the corporate limits of this city, nor any agent, servant, employee or officer of such person, firm or corporation shall charge a fare of more than five (5) cents for conveying a passenger in one continuous passage over any continuous line or lines from any one point to another, situated on any such line or lines and within the corporate limits of the city, from 6 o'clock a. m. until 12 o'clock midnight, and after that hour not over ten (10) cents per passenger. By one continuous passage is meant a passage without a layover, except for such length of time as is necessary for the next car to arrive going towards the passenger's destination; and by a continuous line or lines is meant all lines belonging to or operated by the same person, firm or corporation, and which connect with each other by means of switches, turntables or otherwise, and if disconnected and the distance between the ends of such lines is one block or less; provided that nothing in this section shall be construed to mean that any passenger shall be entitled to passage further than to the point where the car to which he has been transferred turns into the approximate direction from which he came, unless such passenger pay an additional fare. And when a passenger is accepted on a car of any such line, such passenger having paid to the conductor or other person in charge of said car the fare herein provided for, and it shall be necessary for such passenger to be transferred to another car, in order to proceed to his destination over another line owned or operated by the same person, firm or corporation, and connecting therewith, or approaching within one block of such first line, it shall be the duty of such person, firm or corporation, and of its conductor, or other person in charge of such first car, to deliver to any such passenger a transfer

ticket, or other written evidence of his having paid such fare, and of his right to be carried through to his destination on said other line. And it shall be the duty of such person, firm or corporation, owning or operating said lines, and of his or their employees, upon demand and presentation of such transfer ticket, to convey such passenger to his or her destination on said line, and without further charge; provided, that not more than one transfer shall be required to make any one trip; and provided, further that no end of any line shall be arbitrarily established with the object of defeating the purpose of this section.

Sec. 64. If any person, corporation, president, superintendent or general manager, or other officer, agent, servant, or other employee of a corporation shall violate any provisions of this ordinance, such person, corporation, president, superintendent, general manager or other officer agent servant or employee of a corporation shall be guilty of an offense and upon conviction therefor before the recorder, shall be fined in any sum not less than twenty-five dollars ($25.00) nor more than two hundred dollars ($200.00).

Endorsed: No. 214. In Equity. San Antonio Public Service Co. vs. City of San Antonio et al. Plaintiff's First Amendment to Original Bill. Filed July 26th, 1919. D. H. Hart, Clerk, by A. I. Campbell, Deputy.

27 In the United States District Court for the Western District of Texas, San Antonio Division.

No. 214. In Equity.

SAN ANTONIO PUBLIC SERVICE COMPANY

vs.

CITY OF SAN ANTONIO et al.

To the Honorable Judge of said Court:

Come now the City of San Antonio and Sam C. Bell, Mayor, Ray Lambert, Louis Heuermann, Andres Coy and Phil Wright, Commissioners, and R. J. McMillan, City Attorney, respondents herein, and for the purpose solely of pleading to the jurisdiction of the court, respectfully show to the Court:

1. Respondents move the Court to strike out and dismiss the bill filed by complainant in this cause, and to proceed no further with same for the reason that said bill shows upon its face that this cause is not within the jurisdiction of this court, and because the allegation that this court has jurisdiction is fictitious and fraudulent and because a valid cause of action in equity is not stated in the bill.

Respondents would further show to the Court that complainant, in paragraph four of its bill, alleges that on or about the 1st day of July, A. D. 1917, it became, with the consent of the City of San

Antonio, the owner of all the rights, privileges and franchises previously granted to the San Antonio Traction Company. Complainant has failed to attach to the bill a copy of said ordinance consenting to the transfer of such rights to the complainant, and respondents here now attach a certified copy of said ordinance to this plea and mark same Exhibit "A" for identification. That by the terms of said ordinance, which was accepted by the San Antonio Public Service Company, all of the limitations, duties, contracts, forfeitures and obligations imposed on or required of the San Antonio Traction Company at the time when same was passed, to-wit the 10th day of July, A. D. 1917, were imposed on and required of the San Antonio Public Service Company. A certified copy of complainant's acceptance of said ordinance is attached hereto. That at said time there was a valid city ordinance in effect requiring the transportation of
28 passengers by street railway Cos. for (5¢) five cents, with transfers. Accordingly respondents represent to the Court that the City of San Antonio, in demanding of complainant a compliance with its agreement, simply requires of it the performance of its own valid contract, voluntarily entered into. That this demand upon the part of the City of San Antonio is not a taking of complainant's property without due process of law, and accordingly there is no federal question in this case, of such a character as to confer jurisdiction upon this court.

Wherefore, the premises considered, the respondents herein now plead to the jurisdiction of the Court and move the Court to strike out and dismiss complainant's bill filed herein, and proceed no further.

WILLIAM AUBREY,
R. J. McMILLAN,
R. P. INGRUM,
Solicitors for Respondents, City of San Antonio et al.

EXHIBIT A.

Meeting of the Commissioners of the City of San Antonio After Adjournment of July 9th, A. D. 1917.

Tuesday, July 10th, A. D. 1917—4 p. m.

Present: Honorable Sam C. Bell, Mayor, presiding, and Commissioners Lambert, Heuermann and Lowther. Absent, Garland.

Mayor Bell introduced the following ordinance, which was read and adopted by the following vote on roll call, to-wit: Ayes, Bell, Lambert, Heuermann and Lowther. Absent, Garland. Nays, none.

An ordinance granting to and conferring upon the San Antonio Traction Company and the San Antonio Gas & Electric Company the right to transfer and assign unto the San Antonio Public Service Company, a corporation incorporated under the laws of the State of Texas, all of the rights, privileges and franchises of any and every nature whatsoever now possessed and enjoyed by the said San Antonio Traction Company and San Antonio Gas & Electric Company, subject to all of the limitations, duties and obligations imposed upon the said

San Antonio Traction Company and San Antonio Gas & Electric Company and to the requirements and limitations of this ordinance. (For full text of this ordinance see Ordinance Book "F," pages 262 & 263.)

On motion, duly seconded and carried, the meeting adjourned.
Approved:

SAM C. BELL.

Attest:
FRED FRIEA,
City Clerk.

29 An Ordinance granting to and conferring upon the San Antonio Traction Company and the San Antonio Gas & Electric Company the right to transfer and assign unto the San Antonio Public Service Company, a corporation incorporated under the laws of the State of Texas, all of the rights, privileges and franchises of any and every nature whatsoever now possessed and enjoyed by the said San Antonio Traction Company and San Antonio Gas & Electric Company, subject to all of the limitations, duties and obligations imposed upon the said San Antonio Traction Company and San Antonio Gas & Electric Company, and to the requirements and limitations of this ordinance.

Be it Ordained by the Commissioners of the City of San Antonio:

Sec. 1. The San Antonio Traction Company and the San Antonio Gas & Electric Company are hereby granted full and complete right and authority to transfer and assign unto the San Antonio Public Service Company, a corporation incorporated under the laws of the State of Texas, with its principal office in the City of San Antonio, Bexar County, Texas, all rights, privileges and franchises of any and every nature whatsoever heretofore granted to and now existing in and enjoyed by the San Antonio Traction Company and San Antonio Gas & Electric Company; said transfer and assignment to be made within ninety days after this ordinance shall become effective.

Section 2. The rights given to said Companies in Section 1 are subject to the conditions hereinafter set forth. All the limitations, duties, contracts, forfeitures and obligations imposed on or required of either of said companies at this time shall be imposed on and required of the San Antonio Public Service Company.

Section 3. In accepting the provisions of this ordinance the San Antonio Public Service Company agrees that the City shall hereafter have the right to pass all ordinances not in direct conflict with the laws of this State fixing and regulating the rates, prices and terms at which gas and electricity shall be furnished for public and private purposes to the City and its inhabitants. And it is expressly understood and agreed that the City, though consenting to the assignment of these franchises to this one company, shall nevertheless have the right, in fixing such rates, prices and terms upon gas and elec-
30 tricity, to do so separately and independently of the matter of the earnings, or profits, or losses, or investments, of the company

in the transportation branch of its service, and in the same manner and to the same extent as if said branches of its service were still separate and distinct corporations.

Section 4. The San Antonio Public Service Company shall keep an accurate set of separate books and accounts showing the income, cost of operation, maintenance and permanent improvements of each of its plants, to-wit, its gas plant, its electric light plant and its transportation plant which books shall be open to the inspection of the City Commissioners or their authorized representatives.

Section 5. The rights granted herein shall not be exclusive but the City specifically reserves the right to grant franchises to other corporations for the supply of gas, electricity or transportation.

Section 6. The San Antonio Public Service Company hereby agrees that it will cause a line to South San Antonio, Bexar County, Texas, to be built and in actual and continuous operation, within ninety days from the date upon which this ordinance becomes effective.

Section 7. This ordinance shall not take effect until the San Antonio Public Service Company shall, by proper resolution, filed with the City Commissioners of San Antonio, accept all the provisions and limitations of this ordinance, which acceptance shall be filed on or before ninety days after the final passage of same.

Passed and approved this 10th day of July A. D. 1917.

SAM C. BELL,
Mayor of the City of San Antonio.

Attest:
FRED FRIES,
City Clerk.

THE STATE OF TEXAS,
County of Bexar, ss:

I, Fred Fries, City Clerk of the City of San Antonio, in the State and County aforesaid, do hereby certify that the above and foregoing is a true and correct copy of and ordinance entitled "An ordinance granting to and conferring upon the San Antonio Traction Company and the San Antonio Gas & Electric Company the right to transfer and assign unto the San Antonio Public Service Company, a corporation incorporated under the laws of the State of Texas, all of the rights, privileges and franchises of any and every nature whatsoever now possessed and enjoyed by the said San Antonio Traction Company and the San Antonio Gas & Electric Company, subject
31 to all of the limitations, duties and obligations imposed upon the said San Antonio Traction Company and San Antonio Gas & Electric Company, and to the requirements and limitations of this ordinance," passed and approved at a meeting of the Commissioners of the City of San Antonio held on the 10th day of July, 1917, and of record in Ordinance Book "F," pages 262-263 inclusive.

Witness my hand and the seal of the City of San Antonio this 13th day of December, A. D. 1918.

[SEAL.]

FRED FRIES,
City Clerk.

Meeting of the Commissioners of the City of San Antonio.

Thursday, August 16th, A. D. 1917—4 p. m.

Present: Honorable Sam C. Bell, Mayor, presiding, and Commissioners Garland, Lambert, Heuermann, Lowther.

Minutes of previous meeting were ordered approved.

Memorials and Petitions.

The following communication was read by the City Clerk, to wit:

San Antonio, Texas, August 14, 1917.

To the Honorable Commissioners of the City of San Antonio, Texas:

I, R. C. Jones, do hereby certify that I am the Secretary of the San Antonio Public Service Company, a corporation incorporated under the laws of the State of Texas and with its principal office in the City of San Antonio, Bexar County, Texas; that, on Saturday, August 11th, 1917, at a meeting of the Board of Directors of said Company, the provisions of an ordinance passed by the said Commissioners and approved by the Mayor July 10th, 1917, conferring upon San Antonio Gas & Electric Company and San Antonio Traction Company the right to transfer and assign unto the San Antonio Public Service Company all the rights, privileges and franchises heretofore granted to and now enjoyed by said Companies, were in all things accepted by a motion duly made and seconded, reading as follows:

"Mr. Howard Templeton made a motion that the provisions and limitations of an ordinance passed by the City Commissioners of the City of San Antonio, Texas, approved by the Mayor of the City of San Antonio, Texas, July 10th, 1917, conferring upon the San Antonio Traction Company and San Antonio Gas & Electric Company full right and authority to transfer and assign unto the San Antonio
Public Service Company all rights, privileges and franchises
32 of any and every nature whatsoever heretofore granted to and
now existing in and enjoyed by the said San Antonio Traction Company and San Antonio Gas & Electric Company upon the terms and subject to the limitations therein set out, be in all things accepted by the San Antonio Public Service Company. The motion was duly seconded and carried.

"Upon motion duly made and seconded the Secretary of this Company was authorized to certify to that portion of the minutes of this meeting, accepting provisions of the City ordinance above men-

tioned, and cause the same to be filed with the City Commissioners of San Antonio, Texas."

Yours very truly,

R. C. JONES,
Secretary of San Antonio Public Service Company.

Subscribed and sworn to before me by the said R. C. Jones this the 16th day of August, A. D. 1917.

[SEAL.]

J. B. FLANNERY,
Notary Public, Bexar County, Texas.

On motion of Commissioner Garland, duly seconded and carried, the acceptance above set forth was ordered recorded, the original to be filed with the archives of the City.

On motion, duly seconded and carried, the meeting adjourned.

Approved:

SAM C. BELL,
Mayor.

Attest:

FRED FRIES,
City Clerk.

STATE OF TEXAS,
County of Bexar:

I, Fred Fries, City Clerk of the City of San Antonio, in the State and County aforesaid, do hereby certify that the above and foregoing is a true and correct copy of the San Antonio Public Service Company's acceptance of the terms and conditions of an ordinance passed and approved by the Commissioners of the City of San Antonio on the 10th day of July, A. D. 1917: And that the same appears of record in Volume "B," page 533, Journal and Minutes of the Proceedings of the Commissioners of the City of San Antonio.

Witness my hand and the seal of the City of San Antonio this 13th day of December, A. D. 1918.

[SEAL.]

FRED FRIES,
City Clerk.

33 Endorsed: No. 214. In Equity. In the United States District Court. San Antonio Public Service Co. et al. vs. City of San Antonio et al. Plea of Respondents to the Jurisdiction. Filed December 21st, 1918, at 11:25 A. M. D. H. Hart, Clerk. By A. I. Campbell, Deputy.

34 The United States District Court, Western District of Texas, San Antonio Division, December Term, 1918.

No. 214. In Equity.

SAN ANTONIO PUBLIC SERVICE COMPANY

vs.

CITY OF SAN ANTONIO et al.

Memorandum Opinion on Defendants' Motion to Dismiss.

The San Antonio Public Service Company, plaintiff, brings suit against the City of San Antonio, its Mayor, City Commissioners and City Attorney, defendants. Plaintiff will be referred to as "Company" and defendant as the "City."

Company complains that without fault and for causes beyond its control set out in great detail, it is unable to earn a fair return upon its investment unless permitted to charge a greater carriage fare than five cents per passenger as now fixed by City's ordinance; that on March 28th, 1918, the City passed an ordinance prohibiting any public utility company from raising its rates without first obtaining consent of the City so to do; that Company, on August 29th, 1918, sought consent to raise its fare to six cents per passenger which was denied by the City in October, 1918, by an ordinance prohibiting a fare charge in excess of five cents, and imposed a penalty of misdemeanor by fine and forfeiture of franchise right for any violation; that Company desires to raise the rate of fare to seven cents per passenger, or to such other sum as the Court may find necessary
35 to enable Company to fulfill its duties and obligations as a common carrier, and at the same time earn a fair return upon its investment; that the enforcement of the ordinance prevents Company from increasing its rates, and forces it to dedicate its property to public use, depriving it thereof without due process of law in violation of the Constitution of the United States.

Company prays:

(1) That the Court determine (*a*) whether Company can earn a fair return from a seven cent fare, and if not (*b*) to fix a rate of fare that would enable it to do so, and,

(2) In the mean time the City be enjoined from carrying into effect the provisions of the two ordinances.

The City moves to dismiss Company's complaint because from Company's petition it appears that Company, as successor to the San Antonio Traction Company, was obligated to transport passengers for a five cent fare, and that such ordinance constitutes, in effect, a valid contract between the Company and the City, the enforcement of which was being demanded of the Company; therefore the action

of the City in refusing to permit Company to raise its fare could not be a taking of its property without due process of law. The ordinance (1899) under consideration provided:

"said street car companies shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other."

In 1903 the Legislature of the State passed what is known as the "half fare" law, requiring street railways to transport stu-
36 dents of schools, under seventeen years of age, at one-half the fare required of adults. Altgelt filed suit against the San Antonio Traction Company, predecessor of Company, to compel it to carry students at half fare as provided by the Act. The Traction Company contended that the 1899 ordinance constituted a contract with City guaranteeing, during the life of its franchise, a vested right to a return of five cents fare for each passenger; that the statute sought to be enforced would impair the obligation of such contract by requiring the Traction Company to perform the service for a less charge than fixed by the ordinance, consequently violative of the Constitution, void and unenforceable as to the contract in question. This contention was insistently urged by the Traction Company in the Trial Court, the Court of Civil Appeals, and in the Supreme Court of the United States, but those Courts did not consider that question determinative of the issue. The latter Court,—San Antonio Traction Company vs. Altgelt, 200 U. S. 308,—referring to this particular ordinance, says:

"Even if construed as a contract, it was still subject to the provisions of the Constitution of 1876, which in Section 17 of the bill of rights declared that no irrevocable or uncontrollable grant of special privilege or immunities should be made; but that all privileges granted by the Legislature or created under its authority shall be subject to the control thereof."

The Court further declares, p. 309:

"Under the bill of rights of that constitution the Legislature could not reduce the fares to a confiscatory amount or to an amount which would render it unprofitable to operate the road."

the traction company, however, making no claims of that character in that case, but does so in the present case—and finally, holding that the Traction Company must issue the half fare tickets notwithstanding the terms of the ordinance fixing the fare at five cents.

37 The Company contends here that this decision in effect holds that the ordinance in question does not bring into being the contractual relation in the legal sense, but construes the words "shall charge five cents" fare as being mandatory, and regulatory in character, subject to the right of revision by the State,—and also subject to the Constitutional right of the Company to earn a fair return upon its investment.

The City urges that the contractual relation does exist by virtue of the ordinance, thus limiting the maximum fare to be charged by Company, in any event, to five cents subject to revision by the State Under this construction the Company would be required to maintain and operate its railroad charged with its full duty as a common carrier even though forced to bankruptcy.

The Court concedes that if the contractual relation exists as insisted upon by the City, the rule may not be overstated and the Company may not ask the Court to re-write, reform or vary the terms of a lawful obligation, voluntarily undertaken, and the petition should be dismissed.

The power and authority of the City to contract for and fix rates during the term of the Company's franchise, if any such power existed, is shown by the charter in effect at the time of the passing of the 1899 ordinance. Only Section 100 of that Charter is material. It grants power

"exclusively to prevent, control and regulate everything connected with City railroads, and to make such rules and regulations for the same as the city counsel may deem necessary."

The power to "regulate everything connected with City railroads" thus unrestricted would include authority to contract for and
38 fix rates were it not for the bar interposed by the provisions of Section 17 of the bill of rights of the Constitution of 1876, declaring that no irrevocable grant of special privilege or immunity could be made, but should be subject to legislative control. The grant of a right to a city railroad to charge a fixed sum as a passenger fare during the life of its franchise is an irrevocable grant of special privilege expressly prohibited by the Constitution.

The City contends that even if there be an exercise of excess powers, a contract pro tanto nevertheless exists, binding upon the parties, subject to the right of the State to fix and regulate rates resting this proposition on Manitowoc 145 Wis. 25, and Milwaukee vs. Railroad, 153 Wis. 502. These cases turn upon the construction of two sections of the Wisconsin Statutes. The ordinance in its terms in the latter case is substantially of like effect as in the case at bar. The Court held that such an ordinance did not constitute a contract. The City also cites authorities supporting this contention from states where municipalities have been authorized to make inviolable contracts as to rates. Detroit St. Rwy. 184 U. S. 368; Vicksburg vs. Water Co., 206 U. S. 496. But for the very reason that such a contract has the effect of extinguishing pro tanto an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power. Providence Bank vs. Billings, 4 Pet. 514, 561; Railroad Commission cases 116 U. S. 307, 325; Vicksburg, &c. Railroad Co. vs. Dennis, 116 U. S. 665; Freeport Water Co. vs. Freeport City 180 U. S. 587, 599, 611; Stanislaus County vs. San Joaquin C. & I. Co. 192 U. S. 201, 211; Met-
39 ropolitan Street Ry. Co. vs. New York, 199 U. S., 1. And see Water, Light & Gas Co. vs. Hutchinson, 207 U. S. 385.

It is obvious that no case unless it is identical in its facts can serve as a controlling precedent for another, for differences slight in themselves may, through their relation with other facts, turn the balance one way or the other. Illustrations of the truth of this may be found in the cases of Freeport Water Co. vs. Freeport City, supra; Rogers Park Water Co. vs. Fergus 180 U. S. 624, and Knoxville Water Co. vs. Knoxville, 189 U. S., 434, where no authorized contract was found as contrasted with Detroit vs. Detroit Citizens St. Rwy. Co., supra, and Cleveland vs. Cleveland City Ry. Co., 194 U. S., 517, where a contrary conclusion was reached.

The Milwaukee case was taken to the Supreme Court of the United States,—Milwaukee vs. Railroad, 238 U. S. 174,—and judgment affirmed as being the "judicial interpretation of a state statute by the highest Court of the State." The Court was careful to further limit the effect of its affirmance by use of the following language, p. 178:

"On hearing in the Court of first instance, it was held that there was no contract made by the passage and acceptance of the ordinance which we have quoted, and the complaint was dismissed. Upon appeal to the Supreme Court of Wisconsin, that judgment was affirmed. * * * p. 179. In the view we take of the case it is unnecessary to pass upon the question whether the ordinance had the effect to make a contract binding between the City and the Company until subsequent legislative action by the State."

The United States Supreme Court in the Altgelt case, p. 308, expressly declined to decide that this very ordinance constituted a contract pro tanto, being practically the same reservation made by the same Court in the Milwaukee case.

That the 1899 ordinance does not constitute a contract is confirmed by a like construction given to an ordinance of identical effect in Home Telephone Company vs. Los Angeles, 211 U. S. 274. The Court in that case, after reviewing authorities relied on by the City, pages 278 and 277, says:

"All these cases agree that the Legislative authority to the municipality to make the contract must clearly and unmistakeably appear, It does not so appear in the case at bar. The appellant has failed to show that the City had legislative authority to make a contract of exemption from the exercise of the power of regulation conferred in the Charter. It therefore becomes unnecessary to consider whether such a contract was in fact made."

The City in the present case fails to show that it had legislative authority to make the contract it alleges was made with the Company, because the inhibition of the Constitution of 1876 against irrevocable grants of privilege stands squarely in the way; and as stated by the United States Supreme Court, last quoted, it becomes unnecessary to consider whether such a contract was in fact made. The Home Co. vs. Los Angeles practically holds that. The ordinance there in question (1) did not state a contractual relation, and (2) if so, the City was without authority to make such a contract. A like condition exists here. The Ordinance of 1899, and its acceptance by the Company did not constitute a contract, but even

if that were possible, the City lacked the power and authority to make it.

The City insists that at the time of the consolidation ordinance, July, 1917, the City had the power by constitutional amendment and the Home Rule Act passed pursuant thereto, to fix rates and make irrevocable contracts. Even if this be true, no material change has been made in the verbiage of the original ordinance of 1899 by the consolidated ordinance so far as the city railroad is con-
41 cerned. As was said by the United States Supreme Court in Home vs. Los Angeles, 211 U. S., p. 274, referring to an ordinance of like terms and effect, equally applicable here,

"It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement. * * * the ordinance here described was not an ordinance to agree upon the charge. * * * It authorizes the exercise of the Governmental power and nothing else."

For the purpose of the motion to dismiss, the allegations of the complainant's bill are assumed to be true. There can be no doubt that a cause of action for equitable relief is stated in the bill, unless the rights of parties are expressed by contract. The Court is of opinion that no contract is shown to exist by the ordinance set out, but that the rights of parties are controlled by the terms of the ordinances as enactments of law regulating the conduct of a public servant. The City retains ample power to protect the public against excessive charge for service; the Company, by the terms of the constitution, is guaranteed against confiscation of its property rights by regulation which would require its use by the public without a fair return upon the outlay.

The motion to dismiss the complainant's bill will be overruled, and defendant City may file further answer thereto within — days from this date.

A formal order in accordance with this memorandum opinion will be entered of record in due course.

DU VAL WEST,
Judge.

San Antonio, Texas, February 18th, A. D., 1919.

42 Endorsed: United States District Court, Western District of Texas, San Antonio Division. No. 214. In Equity. San Antonio Public Service Company vs. City of San Antonio et al. Memorandum Opinion on Defendants' Motion to Dismiss. Filed February 18, 1919. D. H. Hart, Clerk.

43 In Equity.

No. 214.

SAN ANTONIO PUBLIC SERVICE CO.

vs.

CITY OF SAN ANTONIO et al.

On this the 20th day of February, 1919, came on to be heard the motion of the defendants filed herein on the 21st day of December, 1918, to dismiss this cause (1), for want of jurisdiction, and (2) because the facts stated show no merit in the bill; and the Court having heard and duly considered said motion is of the opinion that the same should be in all things overruled.

It is therefore, ordered, adjudged and decreed by the Court that the said motion of the defendants to dismiss this cause be and the same is hereby overruled, to which ruling of the court the defendants then and there in open court excepted.

It is further ordered that the defendants be required to file answer herein within ten days from February 20th, 1919.

DU VAL WEST,
United States District Judge.

O. K.

R. J. McMILLAN.
WM. AUBREY.
T. B. N. & O.

Entered Equity Journal No. 1, page 331.

Endorsed: No. 214. In equity. San Antonio Public Service Co. vs. City of San Antonio et al. Order Overruling Defendants' Motion to Dismiss Plaintiff's Bill. Filed February 20th, 1919. D. H. Hart, Clerk, by A. I. Campbell, Deputy. Entered, Equity Journal No. 1, page 331.

44 In the United States District Court for the Western District of Texas, San Antonio Division.

No. 214. In Equity.

SAN ANTONIO PUBLIC SERVICE COMPANY

vs.

CITY OF SAN ANTONIO et al.

Respondents' Original Answer.

To the Honorable Judge of said Court:

Respondents, the City of San Antonio, Sam C. Bell, Mayor, Ray Lambert, Louis Heuermann, Andres Coy and Phil. Wright, City Commissioners, and R. J. McMillan, City Attorney, complying with the order of the court heretofore made, file this their answer to complainant's bill, filed herein on November 27th, 1918, but in no way waiving by such answer their plea to the jurisdiction of the court and motion to dismiss, heretofore filed herein and acted upon by the Court; and for such answer respondents respectfully show:

1st. Respondents move the court to strike out and dismiss complainant's bill because same shows upon its face that complainant is attempting to enjoin respondents from requiring of complainant performance of its own voluntary contract and undertaking, to transport passengers during the life of its franchise contract with the City of San Antonio for a five cent fare with universal transfer.

2nd. Respondents move the court to strike out those allegations contained on page 13 of complainant's bill relating to the gas and electric departments of complainant's business, and to require complainant to furnish respondents with a more complete and full bill of particulars with regard to said matters, such allegations complained of being vague, indefinite and mere conclusions of the pleader.

3rd. Respondents move the court to strike out and dismiss complainant's bill because same is lacking in equity and shows upon its face that the complainant is not entitled to the relief prayed for, or to any relief whatsoever.

4th. Further answering, and in bar of complainant's cause of action in this case, respondents represent to the court that complainant's predecessor, the San Antonio Traction Company, voluntarily asked the City of San Antonio for and accepted a forty-year franchise, granting the privilege to use certain streets and public places of the City for the street railway business. That said franchise contract contained, among other provisions, the one set out in
45 complainant's bill, requiring complainant's predecessor to transport passengers within the city of San Antonio for five cents with universal transfer.

5th. That after this franchise was granted and accepted, some question arose as to its validity. That the City of San Antonio, acting in good faith in the matter, passed a confirmatory ordinance, confirming said franchise in and to complainant's predecessor, said confirmatory ordinance containing a provision that the franchise was subject to all existing ordinances of the City of San Antonio, and its own terms, and this confirmatory ordinance was expressly accepted by complainant's predecessor, and at said time there existed, in addition to the Traction Company's agreement to haul passengers for a five cent fare, a city ordinance requiring same and providing for a universal transfer.

6th. That when the State passed the Half Fare Bill, complainant contented itself with litigating the question out with a private individual, and upon the termination of that litigation, adversely to it, made no offer to surrender its franchise, took no legal steps of any character whatsoever with regard to the City, but continued to exercise such franchise, complying with the provision for hauling passengers for five cents with universal transfer, and complying with the State Half Fare Law.

7th. That this condition existed for a period of some twelve or fourteen years, when, in July, 1917, the San Antonio Gas & Electric Company and the San Antonio Traction Company petitioned the City of San Antonio to permit them to transfer their franchise rights to the San Antonio Public Service Company, representing, which was a fact, that they could not make the transfer of these franchises without the consent of the City, and further representing that the right to so consolidate would be an extremely valuable privilege to them, which would in no way affect the public to its detriment.

8th. That the City of San Antonio granted to these companies the right prayed for upon certain conditions, which were set out in an ordinance a copy of which is hereto attached, marked Exhibit "A," which ordinance contained, among other provisions, the following one:

"Section 2. The rights given to said companies in Section 1 are subject to the conditions hereinafter set forth. All the limitations, duties, contracts, forfeitures and obligations imposed on or required of either of said companies at this time shall be imposed on and required of the San Antonio Public Service Company."

This ordinance was by the San Antonio Public Service
46 Company by resolution of its Board of Directors duly accepted and written acceptance of same filed with the City Clerk. This petition for consolidation and this acceptance of this ordinance occurred during the summer of 1917, and at and about just the time when complainant now alleges it was losing money.

9th. Respondents would show to the court that when complainant applied for and accepted this consolidation ordinance the State Half Fare law was in existence and had been in existence for some thirteen or fourteen years. That the city ordinance requiring the haul-

ing of passengers for five cent fare was in existence and had been in existence for many years; and both were being complied with by complainant's predecessor. That the franchise contract for a five-cent fare with universal transfer was in existence and was at that time being complied with by the San Antonio Traction Company. That respondents thought and believed at the time that there was no question as to the binding force and effect of the five-cent fare provision; that no complaint was made in regard to the same by the Public Service Company in asking for this valuable privilege, and no protest with regard to the existence of the half-fare law or the city ordinance was urged when the City was being asked to give them this valuable right.

10th. That at the time the constitution of the State of Texas had been amended granting to cities and towns of over five thousand inhabitants the right of self-government and home rule, and under such constitutional amendment the exclusive control of the streets and alleys and other public places of such cities had been delegated by the Legislature to the City, together with the right to regulate street railway transportation within the city limits and to annex such conditions to franchise rights for the use of such streets as might by the cities be deemed necessary or desirable.

11th. Respondents would show to the court that this agreement upon the part of the Traction Company to haul passengers for five cents with universal transfer was one of the principal considerations moving to it for the granting of this franchise. Should the court hold that the complainant is entitled to continue to operate upon its streets, charging a higher or different rate of fare than that agreed upon in the contract, then the court in effect makes a new contract between the City and the company, and grants to the company rights which the City would not have granted to it and which it does not care to have it exercise upon its streets and public places.

47 12th. Respondents would show to the court that the complainant, because of its action in the premises, is estopped to question the right of the City to make this contract or to annex this condition to this franchise grant, in that the complainant by applying for and accepting this consolidation ordinance under the conditions outlined bound itself to exercise its franchise in the manner provided for, and in no other manner whatsoever, and said Complainant is without standing in this court as a court of equity, and this court will not interpose the equitable remedy of injunction on behalf of the complainant under these circumstances.

13th. Further answering, should the court hold that the matters heretofore plead do not constitute a complete bar to the cause of action asserted by complainant, respondents would show to the court that the ordinance complained of by complainant providing for a five cent fare and a universal transfer is not unjust or unreasonable and does not confiscate complainant's property or deprive it thereof without due process of law.

14th. Respondents deny that complainant's property is of the value alleged by it, and demand strict proof thereof.

15th. Respondents deny that the cost of operation of complainant's property is as alleged by complainant in its bill, and demand strict proof of said allegation. And respondents further represent to the court that the complainant in the conduct of its business has not and is not operating same as economically, prudently and efficiently as same could and should be operated, but on the contrary has been guilty of many extravagances and much imprudence in the operation of said property, thereby causing a loss to themselves and a depreciation of their revenue, which should not be charged to the public in the premises.

16th. Respondents further represent to the court that the complainant operates a line of street railway extending not only into, through and across the corporate limits of the City of San Antonio, but extending for a number of miles outside of the corporate limits of the City. That under the tariffs promulgated by complainant, which complainant proposes to continue to promulgate, a person residing a long distance outside the city limits can ride upon one of the cars of complainant for some nine or ten miles, paying the same fare and tariff that a person residing within the city limits pays for riding a much shorter distance. That the City of San Antonio, in
48 contracting with complainant and its predecessor for a five cent fare, and in passing an ordinance identical with the terms of said contract requiring a five cent fare, simply provided for the use of the facilities of the complainant within the city limits. That the City of San Antonio and its citizens are not interested in or concerned with complainant's furnishing service to parties who live outside the city limits, and no attempt has been made by the City to make any regulation with regard thereto. Respondents submit to the court that it is obviously unfair to the citizens of the City of San Antonio who use complainant's facilities largely for short hauls, to have to pay a higher rate of fare because complainant persists in furnishing to parties who live some five or six miles away from the center of town street car service at a rate of fare less than the cost of such service.

17th. Respondents represent that upon a hearing of this matter the cost of the operation of complainant's facilities for the benefit of those residing at distances beyond the city limits should be taken in consideration, and that the citizens of the City of San Antonio should not be made to suffer by reason of the company's action in furnishing this excessive service for the same rate of fare for which it furnishes the lesser service to the citizens within the City limits.

Wherefore, the premises considered, respondents represent to the Court that the complainant is bound by its voluntary contract and agreement to furnish transportation within the City of San Antonio for five cents with universal transfer; and should the court hold adversely to the contention of respondents in this regard, then respondents would show to the court that its requirement, evidenced by the

ordinance complained of, for a five cent fare with universal transfer, is reasonable so far as transportation within the city limits is concerned and does not confiscate complainant's property or constitute a taking thereof without due process of law, and accordingly respondents pray the court that complainant be denied the relief prayed for and that respondents recover all costs in this behalf expended and go hence without day.

WILLIAM AUBREY,
R. J. McMILLAN,
R. P. INGRUM,
Attorneys for Respondents,
City of San Antonio et al.

STATE OF TEXAS,
County of Bexar:

49 Before me, the undersigned authority, on this day personally appeared Sam C. Bell, who being by me duly sworn, deposes and says that he is the Mayor of the City of San Antonio, and that the facts stated in the foregoing answer are within the knowledge of affiant true, except where stated on information and belief and that as to said facts he believes them to be true.

SAM C. BELL.

Subscribed and sworn to before me, this 6th day of March, A. D., 1919.

[SEAL.]

R. L. DALTON,
Notary Public, Bexar County, Texas.

EXHIBIT "A."

An Ordinance granting to and conferring upon the San Antonio Traction Company and the San Antonio Gas & Electric Company the right to transfer and assign unto the San Antonio Public Service Company, a corporation incorporated under the laws of the State of Texas, all of the rights, privileges and franchises of any and every nature whatsoever now possessed and enjoyed by the said San Antonio Traction Company and San Antonio Gas & Electric Company, subject to all of the limitations, duties and obligations imposed upon the said San Antonio Traction Company and San Antonio Gas & Electric Company, and to the requirements and limitations of this ordinance.

Be it ordained by the Commissioners of the City of San Antonio:

Section 1. The San Antonio Traction Company and the San Antonio Gas & Electric Company are hereby granted full and complete right and authority to transfer and assign unto the San Antonio Public Service Company, a corporation incorporated under the laws of the State of Texas, with its principal office in the City of San Antonio, Bexar County, Texas, all rights, privileges and franchises of any and every nature whatsoever heretofore granted to and now existing in and enjoyed by the San Antonio Traction Company and

San Antonio Gas & Electric Company; said transfer and assignment to be made within ninety days after this ordinance shall become effective.

Section 2. The rights given to said Companies in Section 1 are subject to the conditions hereinafter set forth. All the limitations, duties, contracts, forfeitures and obligations imposed on or required of either of said Companies at this time shall be imposed on and required of the San Antonio Public Service Company.

Section 3. In accepting the provisions of this ordinance the San Antonio Public Service Company agrees that the City shall hereafter have the right to pass all ordinances not in direct conflict with the laws of this State fixing and regulating the rates, prices and terms at which gas and electricity shall be furnished for public and private purposes to the city and its inhabitants. And it is expressly understood and agreed that the City, though consenting to the assignment of these franchises to this one company, shall nevertheless have the right in fixing such rates, prices and terms upon gas and electricity to do so separately and independently of the matter of the earnings or profits or losses or investment of the company in the transportation branch of its service, and in the same manner and to the same extent as if said branches of its service were still separate and distinct corporations.

Section 4. The San Antonio Public Service Company shall keep an accurate set of separate books and accounts, showing the income, cost of operation, maintenance and permanent improvements of each of its plants, to-wit, its gas plant, its electric light plant, and its transportation plant, which books shall be open to the inspection of the City Commissioners or their authorized representatives.

Section 5. The rights granted herein shall not be exclusive, but the City specifically reserves the right to grant franchises to other corporations for the supply of gas, electricity or transportation.

Section 6. The San Antonio Public Service Company hereby agrees that it will cause a line to South San Antonio, Bexar County, Texas, to be built and in actual and continuous operation, within ninety days from the date upon which this ordinance becomes effective.

Section 7. This ordinance shall not take effect until the San Antonio Public Service Company shall, by proper resolution, filed with the City Commissioners of San Antonio, accept all the provisions and limitations of this ordinance, which acceptance shall be filed on or before ninety days after the final passage of the same.

Passed and approved this — day of July, A. D. 1917.

Mayor of City of San Antonio.

Attest:

City Clerk.

51 Endorsed: No. 214. In Equity. In the United States District Court. San Antonio Public Service Company vs. City of San Antonio et al. Respondents' Original Answer. Filed March 6th, 1919. D. H. Hart, Clerk, by A. I. Campbell, Deputy.

52 In the United States District Court for the Western District of Texas, San Antonio Division.

No. 214. Equity.

SAN ANTONIO PUBLIC SERVICE COMPANY

vs.

CITY OF SAN ANTONIO et al.

On this the 5th day of May, A. D., 1919, this cause being called for trial the parties, plaintiff and defendant, appeared and announced ready for trial; and the Court being of opinion that the hearing of the matters and things involved in the cause can more expeditiously and conveniently be had by a reference to a Master, it is ordered that Frank H. Booth, Esq., be and he is hereby appointed Special Master in this cause to hear proof and testimony with respect to the issues involved and arising under the pleadings, and the law applicable thereto, with directions to report his findings of fact and conclusions of law to the court. The Master may exercise the powers conferred by the Equity Rules at any place within or outside of the State of Texas.

DUVAL WEST,
United States District Judge.

O. K.
WM. AUBREY.
T. J. McMILLAN.
T. B. N. & O.

Endorsed: No. 214. Equity. San Antonio Public Service Co. vs. City of San Antonio et al. Order Appointing Special Master. Filed May 19th, 1919. D. H. Hart, Clerk, by A. I. Campbell, Deputy. Equity Journal, Vol. 1, p. 344.

53 The United States District Court, Western District of Texas, San Antonio Division.

No. 214. Equity.

SAN ANTONIO PUBLIC SERVICE COMPANY

vs.

CITY OF SAN ANTONIO et al.

To the Court:

On May 5th, 1919, after the hearing before the Court on the motion of Defendants to dismiss the bill, and the decree denying it,

an order was entered by the Court by which the case was referred to me, as Special Master, to hear proof and take testimony with respect to the issues involved, and arising under the pleadings, and report to the Court my findings of fact and conclusions of law.

Pursuant to that order, the parties appeared before me, through their respective counsel, and the taking of testimony commenced on May 19th, and continued from day to day until the 14th of July. Briefs were subsequently filed, and the matter taken under advisement. I now submit to the Court my findings of fact and conclusions of law, as directed by the order of reference.

Statement of the Case.

The suit was instituted by the complainant against the City of San Antonio, its Mayor and Commissioners, seeking to enjoin the enforcement of an ordinance passed and adopted by the City Council on March 16th, 1899, fixing the rate of fare to be charged by its predecessors, (to whose rights and obligations the complainant succeeded) for the transportation of passengers over the street railway lines located within the limits of the City, upon the ground that the effect of the enforcement of the ordinance was to deprive com-
54 plainant of its property without due process of law, and to deny to it the equal protection of the law, in violation of the Fourteenth Amendment of the Constitution of the United States.

The Complainant is the successor in right of the San Antonio Gas Company, the Mutual Electric Light Company, the San Antonio Street Railway Company, and the San Antonio Edison Company,—the latter two, at the date of the ordinance, being the owners of the Street Railway Lines operated in the city.

The ordinance of March 16th, 1899, provided that the rights, privileges and franchises, theretofore granted to and existing in the companies named, should be and were extended so that the rights, privileges and franchises of the companies which existed until, and which expired on, the first day of July, 1940. This extension was granted upon terms and conditions, as they affected the street railway companies, that they should "pave all tracks between the rails, and all the space between double tracks, and twelve inches on the outside of their tracks, on any streets occupied by them, or either of them, which shall hereafter be paved by the city, as and when the city paves, and with the same material as used by the city." It was further provided that "said street railway companies should charge a five cent fare for one continuous ride over any one of their lines, with one transfer to or from either of the lines to the other." The ordinance provided for the acceptance thereof by the companies, and same was accordingly accepted by them.

On April 4th, 1900, the San Antonio Traction Company was incorporated, and thereafter became possessed of all the rights, privileges, and franchises theretofore belonging to or vested in said street railway companies, and on July 1st, 1917, the San Antonio Public Service Company, the complainant here, was incorporated, and succeeded to all the rights, privileges, and franchises theretofore belonging to the San Antonio Traction Company.

April 10th, 1903, the Legislature enacted a law requiring persons and corporations operating street railways in towns and cities
55 of the State of not less than 40,000 inhabitants, to carry children of the age of 12 years and less at and for one-half the charge, or fare collected for the transportation of adult passengers; and further, requiring that the transportation of children of the age of 5 years and less free of charge. (Rev. St. 1911, Art. 6742 to 6745.) On November 17th, 1903, the Council of the city enacted an ordinance similar to the act of the Legislature, last mentioned, requiring street railway Companies, in the city, to carry children of the age of 12 years or under for two and one-half cents for each child in actual attendance upon school situated within the city, during the scholastic term; and providing further, for the sale of tickets in lots of not less than twenty for the use of school children; and provided penalties for its violation.

By an ordinance approved August 7th, 1900, the grant theretofore made to the various companies were confirmed to the San Antonio Traction Company, and "all of the limitations, duties, contracts and obligations imposed upon or required of the said San Antonio Street Railway Company, and of the San Antonio Edison Company, by the aforesaid ordinance of March 16th, 1899, or any other valid ordinance in force at the time of the acquisition of the properties of the said two companies by the San Antonio Traction Company, shall be and the same are hereby imposed upon and required of the San Antonio Traction Company, and the said Traction Company shall, within three days from the passage of this ordinance, file with the city clerk, its written acceptance of the terms hereof." The ordinance was accepted by the San Antonio Traction Company.

Prior to 1917 the San Antonio Gas & Electric Company had succeeded to all the rights, privileges and franchises of the San Antonio Gas Company, and the Mutual Electric Light Company, mentioned in the ordinance of March 16th, 1899. Thereafter, and in July, 1917, the San Antonio Public Service Company applied to the city council for authority to consolidate and purchase all the properties then owned by the San Antonio Traction Company and the San Antonio Gas & Electric Company. This author-
56 ity was given by an ordinance, the second section of which provides that "the rights given the said companies in Section 1, are subject to the conditions hereinafter set forth. All the limitations, duties, contracts, forfeitures, and obligations imposed on, or required of, either of the said companies at this time, shall be imposed on and required of the San Antonio Public Service Company." It provided for acceptance by the Company, and was subsequently accepted in writing.

After the cause was referred to me, and upon agreement of parties, the complainant inserted in its bill an allegation with respect to the revised criminal ordinance of the city which prohibited the charging of more than five cents per passenger by any street railway line within the city, and prescribing penalties.

Subsequent to the passage of the ordinance of March 16th, 1899, another ordinance was passed requiring the street railways com-

panies to carry all policemen and firemen of the city without charge. Copies of all these ordinances are attached to the pleadings.

The complainant alleged in its bill that the reasonable value of the property devoted to public service was in excess of $5,270,000.00, exclusive of the value of its franchise,—$821,700.00—this being the value at which the franchise was being assessed for taxation purposes to the city.

It was charged that the five cent fare prescribed by the ordinance of March 16th, 1899, "was sufficient, under the conditions then existing, to pay operating expenses, and a fair return on the investment and properties of the said companies," but that since the beginning of the European war in 1914, the cost of labor and material, and all supplies necessary to operate and maintain said street railway business have greatly increased and thereby caused its operating expenses to increase beyond the proportion in which its gross receipts have increased, and that because of such increase in
57 operating expenses the company was unable to operate its property on a five cent fare and enable it to pay operating expenses and earn a fair return upon its investment; that during the year ending September 30th, 1918, the operating expenses of the traction department of the company, exclusive of any items of interest on bonds or other indebtedness, was $1,434,960.98, and that its gross receipts aggregated $1,603,596.59, showing a net return of $168,635.61, representing a return of only 3.2% on the investment, and only 2.77% on the investment with the franchise value added; and that this was not a fair return; and that it was entitled to a return of 10%. (Bill Paragraph 6.)

It was further alleged that since the beginning of the year ending September 30th, 1918, cost of labor and material has greatly increased, and under the present prices of labor and material, those operating expenses for the year ending September 30th, 1919, would be $1,656,000.00, and that there was no probability that such cost would decrease, but would probably increase; and that the complainant then had a demand from its employees for increase in wages which, if granted, would add to operating expenses approximately $158,000.00 per year; that there was no reason to believe that the gross receipts would be greater than for the year ending September 30th, 1918, but the probability was that said receipts would be decreased on account of the termination of the war and removal of soldiers from the camps within and around the city; the result of which would be that the Company would not be able to earn a sufficiency to pay operating expenses and a fair return upon the investment.

It was alleged that on March 18th, 1918, the Mayor and Commissioners passed an ordinance prohibiting public service companies operating within the city from raising rates without first applying to and obtaining consent of the Mayor and Commissioners; that on August 28th, 1918, complainant, finding that a five cent fare was insufficient to pay its operating expenses and a fair return on

the investment, in obedience to the terms of the last ordinance
58 applied to the Mayor and Commissioners of the city for permission to charge a rate of fare of six cents, and upon a hearing of said application the same was denied; that the ordinance denying the application was made arbitrarily and without regard to the undisputed evidence offered by the Company, and that contemporaneously with its denial, the city adopted another ordinance prohibiting the complainant from raising the fares from five cents, and providing penalties and forfeiture of its charter if it should attempt to do so. October 29th, 1918, complainant applied for a rehearing on said application, and the same was denied. It was charged that the acts of the Mayor and Commissioners in denying the application to raise the rates was arbitrary and unreasonable, and without evidence to support the same, and contrary to the undisputed evidence.

It was alleged that the enforcement of these ordinances would be contrary to the Constitution of the United States, and void insofar as they interfere with and prohibit complainant from raising its rate of fare to a point to enable it to earn operating expenses and a fair return upon the investment, and that the enforcement would deprive complainant of its property without due process of law, in violation of the Constitution of the United States; and particularly that portion of Section 1 of the Fourteenth Amendment providing that no State should deprive a person of life, liberty or property without due process of law; nor to deny to any person, within its jurisdiction, the equal protection of the law; and in violation of that portion of the Fifth Amendment of the Constitution of the United States which provides that no persons shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.

The prayer was for preliminary injunction, restraining defendants from enforcing the ordinance above referred to (except the provision relating to carrying policemen and firemen) and from interfering with complainant in any way, in putting in force a seven cent fare for adults, and one-half that amount for the class
of persons specified in the State half fare law; or such other
59 rate of fare as the Court might find necessary to enable the complainant to pay operating expenses and earn a fair return on its investment; and that upon final hearing, the Court determine whether seven cents fare was necessary to the end indicated, and if not, what rate of fare was necessary, and to enter an order and decree perpetually enjoining the defendants from enforcing said ordinance.

After the overruling of the motion to dismiss the bill on the ground of jurisdiction, answer was filed by the defendants, reiterating the matters contained in the motion to dismiss, and pleaded the facts with respect to the passage of the ordinance above mentioned; and specifically, that in July, 1917, the San Antonio Gas & Electric Company, and the San Antonio Traction Company, petitioned the City to permit them to transfer their rights and fran-

chises to complainant, representing, which was a fact, that they could not make the transfer of these franchises without the consent of the city and further, representing that the right to so consolidate would be an extremely valuable privilege to them, and would in no way affect the public to its detriment; that the consolidation ordinance was passed by the Mayor and Commissioners, and duly accepted in writing at and about the time when complainant now alleges it was losing money; that when complainant applied for and accepted the consolidation ordinance, the State half fare law was in existence and had been for 13 or 14 years; that the city ordinance requiring the carrying of passengers for five cents was then in existence, and had been for many years; that both were being complied with by the San Antonio Traction Company; that the franchise contract for a five cent fare, with universal transfer, was in existence, and was at the time being complied with by the Traction Company; that the defendant thought and believed, at the time that there was no question of the binding force and effect of the five cent fare provision; that no complaint was made in regard to the same by the Public Service Company, in asking for the consolidation, and no protest with regard to the existence
60 of the half fare law when the city was asked to permit the consolidation.

In paragraph 10 of the answer, it was alleged that at the time, the Constitution of the State had been amended, granting to cities and towns of over 5,000 inhabitants, the right of self government and home rule, and that under that amendment the city had control of the streets and alleys, and other public places, together with the right to regulate street railway transportation, and to annex such conditions to the right to use the streets as might be deemed necessary.

And in paragraph 11, it was averred that the agreement of the Traction Company to carry passengers for the five cent fare, with universal transfers, was one of the principal considerations moving to it for the granting of the franchise, and should the Court hold that complainant is entitled to continue to operate upon its streets, charging a higher or different rate of fare than that agreed upon in the contract, the Court would, in effect, make a new contract and grant to the latter rights which the former would not have granted.

It was averred that the rate prescribed by the ordinance was just and reasonable and the enforcement thereof would not confiscate complainant's property, or deprive it of its property without due process of law. Denial was made of the allegations of the bill, and it was averred that the complainant, in the conduct of its business, has not and is not operating with the same economy, prudence, and efficiency that the same should be operated; with general averments of extravagance and imprudence in the operation of the property; that complainant was operating lines wholly without the limits of the City at a loss, and that the burden of these losses should not be made to fall upon the traffic within the city; and the Mayor and Commissioners should not be enjoined from enforcing the ordinance even though the rate fails to produce an adequate return when it

appears that the inadequacy of return was due to losses incurred in operating the outside lines.

The principal contention of the defendants is, that the franchise ordinance constituted a contract between the municipality
61 and the predecessors in right of complainant; and that the complainant itself, assumed the duties devolved upon its predecessors, by this ordinance, whereby they and complainant bound themselves to carry passengers for a five cent fare, with the privilege of universal transfer; and, furthermore, that the provisions of the ordinance relating to the fares to be charged was a condition attached to the grant of franchise to the original companies to operate their cars over and along the streets of the city.

These questions were presented to and decided by the Court on motion to strike out the bill, and they were ruled adversely to the defendants. It is, however, insisted that this was simply a preliminary decision, and that the question arose only upon the pleadings, and that the proof, and order of reference, require me to report my conclusions with respect to them. The facts, however, insofar as they affect these questions, were all before the Court in the form of the various ordinances attached to the pleadings, and are the same as those now in the record. Since they have thus been decided by the Court I am content to permit the situation to remain as it is. I have not considered the question.

With respect to what I believe to be the controlling question in the case, I find the following facts:

First. That the terms of the ordinance of March 16th, 1899, prescribing the rate of fare to be charged by complainant's predecessors, are as alleged in the bill; and that the complainant succeeded to the rights of the predecessor companies, subject to all the duties and limitations imposed upon them by that ordinance.

Second. That complainant's predecessor, the San Antonio Traction Company, in operating its lines within and without the limits of the city, during the years 1902 to 1912, inclusive, earned an average dividend of 8.83% on the invested capital; that
62 since 1912 the operating revenues have been as follows: 1913, 2.10%; 1914, 2.22%; 1915, .25%; 1916, 1.59%; 1917, 3.82%; 1918, 4.36%; and that the operating revenue for 1919 will not exceed 3.88% on the value of the property situated within the city limits, after deducting the losses incurred in operating the outside lines.

Third. That during the years 1913 to 1915, inclusive, the average invested capital was $3,374,406.02; that during those years the Company was engaged in reconstructing its lines because of paving being done by the city which necessitated compliance by the company with the provisions of the ordinance of March 16th, 1899, with respect to paving; that on account of the interruption of traffic, due to construction, the company was deprived of revenue in the form of loss of traffic and increase of operating expenses to the extent of $363,701.19; that the operating revenue for those years was $144,776.10; that in 1915 there was a loss in revenue, due to competition, of $135,880.00; that the operation of outside lines resulted in a loss in 1913 of $21,000.00,

1914 of $21,000.00, and in 1915 of $20,000.00. These latter estimates are based upon the relation as the losses of 1918 bore to the total income from passenger traffic of that year. The invested capital during the years 1916, 1917, and 1918, (after eliminating from the latter two, the item of superseded and abandoned property $623,494.90, (Tr., V. 4, p. 679) was, respectively, $4,498,283.83, $4,577,039.04, and $4,630,691.49. The operating revenues for those years amounted to $71,576.65, $201,517.53, and $213,609.14, respectively. The latter does not include excessive charges to operating expenses for that year covering taxes and damages, aggregating $37,986.71. The loss in revenue due to jitney competition during those years was, respectively, $211,000.00, $136,000.00, and $83,000.00. The loss in the operation of outside lines for those years respectively, was $20,000.00, $35,000.00, and $46,000.00. The loss for 1919, due to jitney competition, will be $117,000.00, and in operation of out-city lines $46,000.00.

Fourth. The result of operations in the years 1913 to 1918, inclusive, but for the losses named in the preceding finding,
63 would have been an average, from 1913 to 1915, inclusive, of 6.3%, 1916 of 6.7%, 1917 of 8%, and 1918 of 7%.

Fifth. That the value of complainant's property, within the city limits, necessarily devoted to the public service, in the year 1918, and at the present time, was and is the sum of $4,535,152.88. The method of determining this item is fully explained under subheading hereinafter "Valuation."

Sixth. On April 1st, 1919, an increase of wages was granted by complainant to its employees, to conform to the scale of wages prescribed by the war labor board, and this will result in an annual increase of operating expenses of $193,000.00. I am unable to find that this increase in operating expenses will be offset by any decrease in operating expenses, beyond a saving, for the year 1919, of $12,000.00 in fuel.

Seventh. The gross revenue of the company for the year 1919, as near as I can determine, will be practically the same as for the year 1918; that is, $1,591,190.50. The operating expenses will be the same as 1918, that is, $1,377,581.36, plus 2/3 of the annual increase due to the wage increase on April 1st, less the excess charges in taxes and damages in 1918. The result will be that the operating expenses will amount to $1,456,241.31, operating revenue for 1919, $134,949.19.

But for competition and losses in operating the outside lines, as above shown, the operating revenue would be $297,949.19, or 6.42%.

Eighth. A reasonable return on capital invested in complainant's business, considering the ordinary risks attendant upon it, is eight per cent (8%).

Complainant's Contentions.

The complainant contends that it is entitled to an injunction to restrain the enforcement of the provisions of the franchise of March

16th, 1899, prescribing the rate of fare to be charged by it for the transportation of passengers within the limits of the city, and to give transfers, at any time when the rate prescribed fails to pro-
64 duce revenues sufficient to enable it to pay operating expenses (reasonable and proper in themselves), and to earn a fair return upon the value of the property employed in the public service.

I may observe in the beginning that this is the controlling question in the case. The fact that the Company will not, during the year 1919, and probably for several years, earn a reasonable return upon the value of its property, is so apparent from the record that it will not be disputed by the defendants. The immediate cause of this condition is, speaking generally, the increased cost of labor, material, and supplies, and jitney competition. Various causes have contributed to deplete the revenues of the Company since the beginning of 1913, none of which was due to the rate, or to any action on the part of the defendants. It is simply a question of whether the Court can interfere with the legislative body in the exercise of its proper functions when a rate proves to be inadequate to enable the Company to earn a fair return because of a change in the economic conditions arising subsequent to the fixing of the rate.

The Constitution carefully separates the power of government between the Executive, Legislative and Judicial Departments, and each must act within its proper sphere. The power of the Legislative Department is co-extensive with the whole field in which it operates, and knows no limits save those prescribed by the Constitution itself. The Judicial Department is the final arbiter in all matters affecting Constitutional rights and guarantees, and may determine whether the legislature has exceeded its powers, and if it be found that this has been done, to restrain its action. The scope of discretion which the legislature may exercise is as broad as the power possessed, and is limited only to the extent indicated. In performing the function of safeguarding constitutional guarantees against legislative invasion, the Courts may exercise no discretion whatever. Their powers are limited to the inquiry whether in the particular case the legislature has exceeded its power.

65 In performing the duty encumbered upon it in prescribing the rates to be charged by those engaged in the performance of a public service, the legislature has the same broad range of discretion as in all other matters properly comprehended within its jurisdiction, and this is limited, as has been said, only by the Constitution itself.

The right of the legislature or municipality to control and limit the rate of charge to be enforced by one engaged in the public service is undeniable; but this power of regulation is not without its limitations. In Railroad Commission cases, 116 U. S., 307, 331, the Court, speaking through the Chief Justice, says:

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. The power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry per-

ons of property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

This language was quoted in the subsequent case of Dow vs. Beidleman, 125 U. S., 680, 689.

In Chicago & Grand Trunk Ry. vs. Wellman, 143 U. S., 339, 344, it was said:

"The Legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

The Reagan vs. Farmers Loan & Trust Company case, 154 U. S., 362, 397, answering the contention that the Court had no power to entertain an inquiry of this character, and insisting that the fixing of rates was a matter wholly within the power of the Legislative Department of the Government, and beyond examination by the Courts, the Court says:

"It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative, rather than a judicial function. * * * The Courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all the circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation."

And further, at page 398, it was said:

"These cases all support the proposition that while it is not the province of the Courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every Constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a govern-

ment, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

And further:

"It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet, justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others. There may be circumstances which would justify such a tariff; there may have been extravagance and needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value. The road may have been unduly built, in localities where there is no sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built, as well as the rights of those who have built the road."

67 In St. Louis & San Francisco R. R. vs. Gill, 156 U. S., 649, 657, the Court said:

"* * * there is a remedy in the Courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the Courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of equal protection of the laws."

In Covington, etc., Turnpike Co. vs. Sanford, 164 U. S., 578, 594, the Court, after reviewing all the previous cases on the subject, said:

"The cases to which we have referred relate to the power of the legislature over rates to be collected by railroad corporations. But the principals announced in them are equally applicable, in like circumstances, to corporations engaged under legislative authority in maintaining turnpike roads for the use of which tolls are exacted. Turnpike roads established by a corporation, under authority of laws, are public highways, and the right to exact tolls from those using them comes from the State creating the corporation. (California vs. Pacific R. R., 127 U. S., 1, 40.) And the exercise of that right may be controlled by legislative authority to the same extent

that similar rights, connected with the construction and management of railroads by corporations, may be controlled. A statute which, by its necessary operation, compels a turnpike company, when charging only such tolls as are just to the public, to submit to such further reduction of rates as will prevent it from keeping its road in proper repair, and from earning any dividends whatever for stockholders, is as obnoxious to the constitution of the United States as would be a similar statute relating to the business of a railroad corporation having authority, under its charter, to collect and receive tolls for passengers and freight."

And further:

"It is proper to say that if the answer had not alleged, in substance, that the tolls prescribed by the act of 1890 were wholly inadequate for keeping the road in proper repair and for earning dividends, we could not say that the act was unconstitutional merely because the company (as was alleged and as the demurrer admitted) could not earn more than 4% on its capital stock. It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stock holders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. * * * If the establish-
68 ing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use its property. * * * If a corporation cannot maintain such a highway and earn dividends for its stockholders, it is a misfortune for it and them which the constitution does not require to be remedied by imposing unjust burdens upon the public."

On the point suggested in the last quotation, I quote further from Reagan vs. Farmers Loan & Trust Co., as follows:

"They who invest their money in railroads take the same chances that men engaged in other business do of making profit from the carrying on of their business; and, as appears from other cases submitted to us with this, some of the railroads in the State of Texas have been operated at a constant loss. But such possibilities of loss are simply the natural results of all business freely carried on, against which the law is powerless to afford protection."

In Smyth vs. Ames, 169 U. S., 466, the Court stated the result of their previous decisions in the following language, in part:

"While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution se-

cures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the State or by regulations adopted under its authority, that the matter may not become the subject matter of judicial inquiry."

The Court further says:

"What are the considerations to which weight must be given when we seek to ascertain the compensation that a railroad company is entitled to receive, and a prohibition upon the receiving of which may be fairly deemed a deprivation by legislative decree of property without due process of law?"

Answering this question the Court observed that the question could more easily be determined by a commission composed of persons whose special skill, observation and experience qualify them to handle great problems of transportation as to do justice both to the public and those whose money has been used to construct highways for the convenience of the people. But despite the practical
69 difficulties which confront them, the Courts could not shrink from their duty to determine whether the rates prescribed invade or destroy rights secured by the Constitution. And:

"The duty rests upon all Courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no rights secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which we enjoy under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

That case shows (p. 543) that it was contended that a railroad company was entitled to exact such charges for transportation as would enable it at all times not only to pay operating expenses, but also to meet the interest regularly accruing on all of its outstanding obligations, and justify a dividend to its stockholders, and that to prohibit it from doing so would be to deprive it of its property without due process of law, and deny the equal protection of the law.

With respect to that contention, the Court said (p. 544):

"In our opinion, the broad proposition advanced by counsel involves some misconception of the relations between the public and a railroad corporation. It is unsound in that it practically excludes from consideration the fair value of the property used, omits altogether any consideration of the right of the public to be exempt from unreasonable exactions, and makes the interests of the corporation maintaining a public highway the sole test in determining whether the rates established by or for it are such as may be rightfully prescribed as between it and the public. A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the State. Such a corporation was created for public purposes. It performs a function of the State. Its authority to exercise

the right of eminent domain, and to charge tolls was given primarily for the benefit of the public. It is under governmental control though such control must be exercised with due regard to the constitutional guarantees for the protection of its property. * * * It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value *of the* for the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividen*t* to stockholders."

70 And at page 546 it is said:

"It cannot be assumed that any railroad corporation, accepting franchises, rights and privileges at the hands of the public, ever supposed that it acquired, or that it was intended to grant to it, the power to construct and maintain a public highway simply for its benefit, without regard to the rights of the public."

The holding of the Smyth vs. Ames case was reaffirmed in San Diego Land Co. vs. National City, 174 U. S., 730.

"The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just both to the owners and the public." (Willcox vs. Consolidated Gas Co., 212 U. S., 19, 41.)

From the authorities cited I deduce the following conclusions:

First. The power to prescribe the rates to be charged by persons and corporations engaged in the performance of a public service is legislative in its nature, and may be delegated to a commission. In the exercise of this power the legislature or commission may do anything, or prescribe any rule or rate they please, within the limit that the act done, rule or rate prescribed, shall not operate to deprive the regulated person or corporation of property without due process of law, or to deny them the equal protection of the law.

Second. The limitation stated fixes the power and authority of the Courts to interfere, and prescribes the bounds within which they may exercise their functions. They can interfere with the legislative function only when it is found that constitutional guarantees have been impinged or denied.

Third. In interposing their authority and power, the Courts have no discretion to exercise. When it is said that the Courts have the power to inquire whether a body of rates prescribed by the legislature or a commission are unjust and unreasonable, what is meant is that they may do this when the rate prescribed is unjust and unreasonable to the extent that it works a practical destruction of rights of property.

71 Fourth. The Courts do not possess the power to revise or change the rules or rates prescribed, nor determine whether one is preferable to another; nor what is fair and reasonable under the circumstances of particular cases.

Fifth. A person or corporation engaged in a public service is entitled to a fair return upon the value of that which is employed in the public service; but the mere fact that it is unable to do this is not conclusive that the rate prescribed is unjust or unreasonable, in the constitutional sense.

Sixth. While the public service company is entitled to a fair return, this is limited by two things, (*a*) that there is no public guarantee, and (*b*) if it is unable to earn a fair return, when that is due not to the rate itself but to conditions over which the legislature or commission has no control, the Courts cannot interfere. The Constitution contains no guarantee against losses due to competition or adverse conditions of market with respect to the cost of labor, material or supplies.

Seventh. The Courts are authorized to intervene in such cases only because of some definite, affirmative action by the legislature or commission.

The ordinance by which the original companies were granted franchises, to which complainant succeeded, to operate over and along the streets of the city, and prescribing the rate of fare to be charged, was enacted in 1899, was accepted by the grantees, and has been acted upon continuously from that time to the filing of the application for an increase of fares before the Mayor and Commissioners in the summer of 1918. It is alleged in the bill that at the time of the passage of the ordinance a five cents fare "was sufficient, under the conditions then existing, to pay operating expenses and a fair return on the investment in the properties" and to render the service demanded by the public. But, it is said, that since the beginning of the European war, the costs of labor, material, and
72 supplies, used in the operation of these lines, have so greatly increased, and so out of proportion to the increase of revenue, that complainant is unable to operate under the five cents fare and pay operating expenses and make a fair return upon the value of the property employed in the public service.

The record discloses that the rate prescribed was sufficient to enable the company, up to and including 1913, to earn an average dividend of 8.83% (Tr. V. 3, p. 321); but in 1903 and 1904 the normal income of the company was materially reduced as the result of a strike of its employees. The earning for those years was 4.03% and 5.14%. Those were not normal years, and to determine upon a just basis of the rate of return under normal conditions, those years should be excluded. If this be done, the operations for the remaining years resulted in dividends of 9.97%. (Tr. V. 3, p. 321.) In 1913 the city inaugurated the very extensive paving program which extended through the years 1913, 1914 and 1915. Furthermore, in 1915 the company lost, on account of jitney com-

petition $135,800.00. (Tr. V. 3, p. 465.) The result of these conditions on operations was a reduction of revenue to the extent of $396,567.58, and an increase in operating expenses of $102,933.61. (Tr. V. 4, p. 611.) The operating revenues for those years aggregated $144,776.10. (Tr. V. 3, p. 321.) So that but for the conditions of competition, and of the necessity of reconstructing its tracks, and paving, as it was required to do under the franchise ordinance, the total revenue for those years would have been $664,277.29. The average investment was $3,374,406.02. (Tr. V. 3, p. 321.) The average annual operating revenue would have been $314,759.06. The result in the end would have been, but for these conditions, an earning of 6.3% on the investment. This does not take into account that in the amount of invested capital a large amount of property is included, which, in fact, did not exist; nor does it take into account the loss incurred in operating the lines outside of the city limits; nor does it exclude the value of those lines.

73 In 1916 the invested capital, without deducting the superseded and abandoned property and out-city lines, was $4,498,283.83. The operating revenues was $71,570.55. The loss on account of jitney competition was $211,500.00, and I estimate the loss in the operation of out-city lines at $20,000.00. It results from this that but for the loss on the out-city lines, and those due to competition, the return would have been 6.7%.

The operations during 1917, arrived at by the same method, but deducting the superseded property value, and estimating the loss on account of competition at $136,050.00, and loss on out-city lines at $35,000.00, the result would have been an earning of 8%.

The result of operations in 1918, but for these conditions, would have been a return of 7%. In computing the return for 1918 I deducted the value of superseded property and abandoned property, but the invested capital upon which this result is based is approximately the same as I now find to be the present reasonable value of the property.

The condition of competition still continues, and the results of the first four months of 1919 indicates that the jitneys will take during this year $117,000.00. The result of operations for the year 1919, after disallowing as an operating expense the reconstruction reserve, will be not exceeding $134,949.19.

The decrease in operating revenue in 1919 below that of 1918 is due, in addition to the causes I have mentioned, to an increase in wages granted in April, 1919, and the increase in cost of material and supplies, which I have not taken into consideration in the previous estimates, though from 1914 to the present time there have been very great advances in prices of all labor, material, and supplies.

The loss in revenue being due to these causes, the question arises whether the complainant is entitled to an injunction to restrain the enforcement of the rate ordinance, because inadequate. In other words, does the Court possess the power to enjoin the enforce-
74 ment of a rate, reasonable when prescribed, simply because conditions have so changed as to disenable the company to

earn operating expenses and pay a fair return upon the value of its property?

The case is peculiar in that the rate was prescribed more than twenty years ago. The city has not attempted to reduce it; and has affected it only to the extent of requiring the company to carry policemen and firemen without charge; and the company is not seeking to enjoin the ordinance requiring that to be done. I have found no case where this condition has existed. All the cases decided by the Supreme Court are cases in which an existing rate had been reduced (or one fixed by annual adjustment), to such an extent, as it was claimed, that the companies under the new rates could not earn a fair return over and above all proper charges of operating expenses, etc.

As I view the matter, to hold that the Court can grant relief by injunction in such a case is tantamount to saying that it can guarantee to the company a fair return.

The Court will be careful not to lose sight of the guiding principle by which the exercise of its power is expressly limited. It has no power to fix rates, nor to review or revise the action of the legislature, or in this case, the Mayor and Commissioners acting under delegated authority. It cannot substitute its judgment for theirs. They may exercise a very broad discretion,—the Court has no discretion to exercise. They have the right and power to view "changed conditions," and to raise the rates if they see proper to do so; but their failure to exercise this discretion does not, in my opinion, authorize the exercise of power by the Court. It must never be forgotten that the Court is called upon to sit in judgment with respect to the charge that those to whom have been committed the power and authority to prescribe rates have so far disregarded the rights of the complainant as to work a confiscation of its property; nor can it overlook that its judgment may interfere with the proper exercise of a discretion inherent in a co-ordinate, and independent department of the
75 Government. The Supreme Court has been emphatic that there can be no judicial interference with the action of the legislative department in prescribing rates, except in the clearest case of invasion of private rights and to the extent of confiscation.

The Court possesses the power to annul and set aside a rate or charge prescribed by the State or under its authority, only upon the ground that its effect, in actual operation, results in the practical taking of private property for public use without just compensation, or to work a denial of the equal protection of the law. In the exercise of this power, undoubtedly right in its assertion, the courts have been met at every step with manifold doubts and difficulties, but have never hesitated, and should not hesitate, in a proper case, to lay their restraining hand; nor have they lost sight of the delicacy of questions engendered by the limitations upon their own jurisdiction. The Court cannot emphasize too strongly the degree of caution with which the subject should be approached.

The revenues of this company for the year 1919 will little more than be sufficient to meet its operating expenses and pay interest on its bonds (and the property is bonded for less than one-half its real value), and may be insufficient for those purposes. But the condi-

tions which have brought about this situation are such as address themselves to the discretion of the Mayor and Commissioners. The Court, as I have said, has no discretion to exercise. It can neither revise the action of the rate making body nor interfere with their discretion. It does not possess the same extensive powers as are delegated to them. It can interfere only to prevent unlawful and wrongful action amounting to confiscation; and this does not mean simply a failure on the part of the Mayor and Commissioners to exercise their discretion in such a way as to meet the adverse conditions which now confront the company.

There is an equipoise of interest in a case of this kind. The company has undertaken the performance of a public duty, and,
76 as I believe, subject to the ordinary vicissitudes of business; it is endowed with the sovereign power to take tolls for the use of its road, and to exercise the power of eminent domain; it enjoys what has in the past been, for all practical purposes, a monopoly of the use of the streets of the city,—the property of the public; it has taken upon itself in consequence the duty of exercising the rights enjoyed for the benefit of the public, and it is not unjust to it, or its stockholders, that its operations should be conducted in subordination to the just interests of the public. On the other hand, the public has no right to demand, or expect, that the service performed shall be without substantial reward. The Supreme Court has, however, expressly declined to lay down an absolute rule that in every case a failure to produce some profit to those who have invested their money in such an enterprise, is sufficient to call into play the judicial power. (Reagan vs. Farmers Loan & Trust Co., supra); and, furthermore, as was said in that case, they take the same chances of loss as those engaged in any other business.

The Company was, by the ordinance in question, required to pave between the tracks and 12 inches on each side, and between all double tracks. The result of the reconstruction work was that much of the track was torn up, the movement of traffic seriously interfered with, a diminution of business with resulting loss of earnings, and, at the same time, a material increase in *its* operating expenses. Furthermore, from 1915 to date, the revenues of the company have been seriously impaired by jitney competition. In April of the present year an increase of wages of the employees was necessary to correspond with the scale prescribed by the War Labor Board, and to meet the necessities of the men employed. The rate prescribed by the ordinance is insufficient, because of the changed conditions since the rate was fixed twenty years ago, to enable the company to earn a fair return; but, I have reached the conclusion that to admit the contention of the company would be for the Court to exercise a power it does not possess; and to hold that the public must
77 underwrite the adverse conditions shown here to exist; that a rate prescribed by those upon whom the duty rests, reasonable at the time, may be enjoined for no other reason than the existence of conditions over which they have no control, simply in order that stockholders may have dividends. A rate, reasonable when fixed, does not become unreasonable, from the judicial point of view, be-

cause of changed conditions. In view of the rights and privileges granted to the company, it seems to me that justice to it does not require that the consequences of adversities should be shouldered upon the public. They should be treated and considered as vicissitudes and risks of the business, for which the public is not responsible. However this may be, it is certain that the Court is powerless to relieve against them; for, it cannot be that because the company has suffered such losses the rate making body has been guilty of, in legal contemplation, confiscating its property or denying to it the equal protection of the law. The conditions shown to exist more appropriately address themselves to the rate making body, and the fact that that has been done, and the appeal denied, affords no ground for action by the Court. The Court cannot prescribe a guarantee against competition or any other of the conditions contributing to the embarrassment of the company.

The counsel for complainant state their proposition in the following language:

"An ordinance, though reasonable when passed, may be enjoined when, under new circumstances, it becomes unreasonable."
(Brief, p. 90.)

Having expressed my own views on the subject, I shall now refer to the arguments of counsel. Before doing so, however, I take occasion to direct attention to the argument made on the subject of the rate of return to which the company is entitled, as a recognition of the correctness of the conclusions I have reached. In discussing that question at page 38 of their brief, they argue that in determining the rate of return to which the Company is entitled, the amount of risk of the business is a most important factor, and, at page
78 39, they say that there would be some hazard in making a fair return, even if they did not have to secure the permission of the Mayor and Commissioners to raise the rates.

"This because of probable competition, lack of patronage, high cost of material, and other operating expenses, etc."

That counsel are right in this is clearly indicated in what was said in Willcox vs. Consolidated Gas Company, 212 U. S., 19, 48, wherein it was specifically pointed out that "the amount of risk in the business is a most important factor" in determining the compensation to which a public utility company is entitled. Then, if it be true as contended by the complainant that it is entitled, as of right, to increase its fares whenever the return falls below that which it conceives to be fair, where is the risk of the business? There is none, except a possible delay in adjusting its rates through an application to the Mayor and Commissioners; but that is no risk, for the conclusive presumption is that they will accord their action to the mandate of the law, and increase the rate whenever it becomes inadequate.

They say that the Court in effect decided the question before the case was referred. I have examined the opinion of the Court and find no reference whatever to any such question. The question decided was, whether the ordinance constituted a contract. The mo-

tion to dismiss did, in fact, present the question that there was no equity in the bill, but this was argued and presented upon the theory that the want of equity in the bill was because the ordinance constituted a contract.

It is said that this question was under consideration by the Supreme Court in the case of Columbus Street Railway Co. vs. City of Columbus, 39 Supreme Court Reports, p. 349,—but an examination of that case discloses that but two questions were involved,—whether the franchise ordinance constituted a contract, and, if so, whether the contract had been abrogated or rendered unenforceable by reason of conditions arising during the war. Of course, the Court might have disposed of the case by holding that the ordinance, having
79 been passed in 1901, and these conditions subsequently arising, would not afford grounds for relief; but that question was not suggested, nor was it even mentioned by the Court.

The distinction suggested by counsel between a statute or ordinance which is in itself unconstitutional, and the effect of the enforcement of an otherwise constitutional law in an unconstitutional way has no bearing upon this case. There is, of course, no claim that the ordinance, when passed, was void or, in fact unreasonable, or that its enforcement would result in depriving complainant of its property without due process of law.

It is said that the contention of complainant is sustained by the Minnesota rate cases, 230 U. S., 352, where the Court considered, in one opinion, three cases involving the Northern Pacific, the Great Northern, and the Minneapolis & St. Louis Railways. Those were cases where an existing rate had been reduced by the Railroad & Warehouse Commission, and an injunction was sought against the enforcement of the new rate. The Court decided that as to the Northern Pacific and the Great Northern, no cause was shown for judicial interference, but as to the Minneapolis & St. Louis Ry., the rate statute could not be enforced because the result would be to deprive it of its property without due process of law. And, with respect to the last company, the injunction was granted. As to the Northern Pacific and Great Northern, it was denied.

Counsel propounded the question,—"Did the Supreme Court consider it necessary to hold that the statute was unreasonable when passed?" and say "The answer is obvious". What the Court decided was that the statute could not be enforced against the Minneapolis & St. Louis Railroad Company because such enforcement would result in depriving it of its property without due process of law. It could be enforced against the other roads because the result of its enforcement would be different.

The principal point which counsel rely upon, based upon that decision, is "it recognizes that such a statute may be invalid and unenforceable against a corporation at one time, and then become
80 valid and enforceable against the same corporation at another time 'by reason of a change in circumstances.'" And they quote from the order of the Court as follows:

"That the members of the Railroad & Warehouse Commission and the Attorney General of the State may apply, at any time, to the

Court, by bill or otherwise as they may be advised, for a further order or decree, whenever it shall appear that by reason of a change in circumstances the rates fixed by the State's acts and orders are sufficient to yield to the company reasonable compensation for the services rendered."

It is obvious that the Court recognized, as it has done in many other cases, that a rate may be invalid and unenforceable at one time, and then become valid and enforceable, as to the same corporation, at another time, and the reason for the direction contained in the order is that the rate making body shall not be trammelled in its action by judicial decree which settles for all time, and under all circumstances, the unenforceability of a rate or statute. The Court has taken occasion to reverse cases of this kind where the decree below omitted such a provision. The counsel argue from this that the Court had in mind the very point now under discussion; but the sufficient answer to that is that, if the Court entertained the opinion that the Northern Pacific and the Great Northern might not thereafter, by reason of "changed conditions" be able to earn a fair return, under the rates prescribed, and this would give them the right to an injunction against the enforcement of the rates, the direction of the Court would have been, as to those companies, that the bill be dismissed, "with leave granted to them to apply to the Court at any time, by bill or otherwise as they may be advised, for further order or decree, whenever it shall appear that by reason of a change in circumstances, the rates fixed by the State's acts and orders, are insufficient to yield to them a reasonable compensation for the service rendered."

It seems strange to me that if the Supreme Court has considered the question of the propriety of such a direction, it has never been suggested in any of the numerous cases decided by them. The mere fact that the Court has never given such a direction is, in truth, very persuasive that a decree dismissing a bill is a
81 final determination that the rate when prescribed was reasonable, and could not thereafter be inquired into because of a change of conditions and circumstances; and that is why they have preserved the right to the Commissions to have relief against the injunction if changed conditions justify.

The case of Lincoln Gas Co. vs. Lincoln, decided by the Supreme Court on June 2nd, 1919, deserves to be noticed in this connection, as it is the only case which, in my opinion, tends in the least to sustain the contentions of complainant. The particular point relied upon is the order of the Supreme Court directing the modification of the decree dismissing the bill, in so far as it related to the ordinance of the City of Lincoln establishing a rate of charge for gas in the city, so that it should be without prejudice to the commencement of a new action to restrain the ordinance. The language of the Court is very strongly indicative that the Court entertained the opinion that a rate ordinance reasonable when passed, may become unreasonable, in a constitutional sense, by reason of changed conditions. What the Court said was this:

"Perhaps it would go without saying, but in our opinion the decree ought to be modified so as to permit the complainant to make another application to the Courts for relief against the operation of the ordinance hereafter, if it can show, as a result of its practical test of the dollar rate since May 1st, 1915, or upon evidence respecting values, costs of operation, and current rates of return upon capital as they stand at the time of bringing suit and are likely to continue thereafter that the rate ordinance is confiscatory in its effect under the new conditions."

This, as I have said, is the only intimation I have found, in any of the decisions in that Court, that tends to sustain the complainant's contention, and in view of previous expressions of the Court on that subject and the peculiar facts of the case there under consideration, I do not believe that the Court intended to lay down the rule as broadly as contended for by Counsel.

I have quoted above from several of the cases which bear directly upon this point, and particularly Covington Turnpike Co. vs. Sandford, 164 U. S., supra; Smyth vs. Ames, Supra; Reagan vs.
82 Farmers Loan & Trust Co., Supra. It will be observed that the language of the Court in the Covington Company case was:

"If the establishment of the new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use its property. * * * If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public."

By reference to the report it will be found that this language was evidently intended to meet an allegation in the bill that the revenues of the Company had been depleted because of the construction of the Louisville & Nashville and the Cincinnati & St. Louis Railroads in such locations as to draw traffic from the turnpike road; and, I think, is an authority to sustain the proposition that a rate does not become unreasonable, in the constitutional sense, and may be enjoined where the inadequacy of the return is due to competition.

The Lincoln case was first before the Supreme Court and decided February 19th, 1912, and reversed. The last report of the case shows that it was instituted in December, 1906, without previous tests of rates; that a preliminary injunction was granted against its enforcement, and it was not put into effect until May 1st, 1915, pending the hearing upon the Master's report, made pursuant to his investigation after the reversal in the Supreme Court. It was put into effect pursuant to an agreement of Counsel. It therefore appears that the result of putting the rate in effect was not shown by the record. The litigation had been pending nearly 13 years. The Court says:

"The litigation has been extremely tedious and burdensome to both sides, and it ought now to be brought to a conclusion upon the record as it stands."

The trial court had twice decided that the rate was not confiscatory, but notwithstanding these decisions, and the decisions of the Supreme Court in the Knoxville Water Company case, and the Willcox case, very clearly indicating an indisposition on the part
83 of that Court to restrain the rate in the absence of an actual test, the Company had consistently refused to put the rate into effect until nine years after the passage of the ordinance. Certainly the litigation ought to have been brought to a conclusion, as it was. As the matter stood before the Court, the rate had not been put into effect, and its direction for a modification of the decree of dismissal is consistent with the previously expressed opinions in the Knoxville and Willcox cases, that they should not be enjoined except after a reasonable test.

I am unable to concur in the contention that this case establishes that a rate reasonable when prescribed may be enjoined because the return is inadequate when this is due to either one or all of the conditions that exist in this case, and to have operated to reduce the revenues of the Company. To my mind, it is inconsistent with much that has been said by the Supreme Court in cases of this kind, and, I think, this Court would not be justified in enjoining the rate unless and until the Supreme Court shall expressly decide that it should be done.

The improvidence of granting an injunction in this case upon conditions as to security for the return of excess charges usually embodied in decrees granting preliminary writs, is obvious in this case, for the reason that it would be impracticable, not to say impossible, for the records of the Company to be kept in such way that refunds could be made if the Supreme Court should ultimately decide that the injunction should not have been issued. If the injunction is issued, the Mayor and Commissioners would have the discretion to either increase the rate of fare or repeal that provision of the franchise ordinance requiring the Company to give transfers and doing away with cross town riding; and in either event if it should be finally decided that the injunction was improvidently granted, it would, from a practical standpoint, be impossible to refund to the public the excess fares collected in the meantime.

84 Valuations—*General Considerations.*

I have previously stated my conclusion to be that the value of complainant's property, upon which it is entitled to earn a fair return, was $4,535,152.88.

I shall now state the considerations by which I reached that result.

While counsel for the company concede that the true inquiry is the reasonable value of the property employed in the public service, they, nevertheless, contend that the case of Denver vs. Denver

Union Water Works, 248 U. S., 178, holds that this means cost of reconstruction, less depreciation. In other words, that in ascertaining value, the Court is limited to the consideration of cost of reconstruction and depreciation. The process by which the value of the property was determined by the Master, and approved by the Court, was as follows: The Land and Water rights were appraised at their then market value. The estimates of the cost of reproducing, —the cost of structures—were made, and from this cost allowance for accrued depreciation was deducted, so as to determine the reasonable value of the structures in their present condition; and in estimating the cost of reconstruction it was assumed that the work would be done under contract after fair competitive bidding, and with reasonable costs for engineering and superintendence, in addition to the contract cost. The approval of this method of computation leads to the contention in this case that, as to all property of the company other than real estate, the court is limited, in arriving at the value of the plant, to the consideration of cost of reproduction, less depreciation; in short, that cost of reproduction, less depreciation, is the reasonable present value. (Tr. V. 2, p. 280.)

What the Court said in that case on this subject, was:

"What we have said establishes the propriety of estimating complainant's property on the basis of present market values as to land, and reproduction cost, less depreciation, as to structures" (p. 191).

85 There was no contention in the case with respect to the values found, except that the item of "going concern" value should have been excluded. The correctness of the method there employed was not in question. Under these circumstances, the propriety of the use of this method is obvious. But I do not understand the case to hold that, as to depreciable property, cost of reproduction, less depreciation, shall control the ultimate question of value, any more than original cost would control. If the cost of reproduction, less depreciation, exceeds the reasonable value, all legitimate factors being considered, it does not control. The Court would not be justified in confining the inquiry to so narrow a limit, where it appears, as it does here, that conditions of the market, with reference to the cost of labor, material, and supplies, which go to make up the completed plant, are far from normal. The Supreme Court, in the Knoxville Water Company case (212 U. S., 1, 15), said that the operations of the preceding fiscal year, or of any other past fiscal year, were valueless if the year was abnormal, and were only of significance so far as they foretold the future.

What the Court said in the Denver Waterworks Company case is very far from establishing the proposition urged by counsel. Obviously, if the method used by the master was not clearly wrong, and acquiesced in by the parties, the Court would approve his action; and, if I had nothing before me except evidence of the cost of reproduction and accrued depreciation, on the basis of 1919 prices,

I would be required to find the fact accordingly, and my action would, beyoud doubt, be approved.

Cost of reproduction is simply one element in the general inquiry; it does not control the ultimate decision of fact. If original cost were shown, and nothing more,—nothing to indicate improvident, wasteful, or needless expenditures, that would control, and a finding based upon it would doubtless be sustained; but original cost is, generally, only one of the many elements to be considered. Cost or reconstruction, less depreciation, may exceed the fair and reasonable value of the property, and I am of opinion that in this
86 case it does, due to transient causes and abnormal conditions, affecting not only the United States but the whole world. Original cost of construction, where proper management of expenditures is shown, and made when times were normal, would afford very high evidence of value when that question is to be determined in a case of this kind, having, as we must, a due regard for the public interest. The case may not rightly be judged from that viewpoint alone. In ascertaining the value of complainant's property sight must not be lost of the public interest. The Court must determine the fair, present value of the property, and that involves what is fair to the public. Of course, if the property has enhanced in value since its construction, the company is entitled to earn on that value nevertheless; but if this be due to abnormal conditions, resulting from increased cost of the various parts of the plant, it might very well be decided that the company would not be entitled, as of right, to earn a return upon it. (Willcox vs. Consolidated Gas Co., 212 U. S., 19, 52.) In the case cited, the Court said:

"If the property, which legally enters into consideration of the question of rates has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule. We do not say there may not possibly be an exception to it, where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public. How such facts should be treated is not a question now before us, as this case does not present it. We refer to the matter only for the purpose of stating that the decision herein does not prevent an inquiry into the question when, if ever, it should be necessarily presented."

Smyth vs. Ames, supra, is the pioneer on this subject. In that case the Court said:

"And in ascertaining that value, the original cost of construction, the amount expended in permanent improvements, the amount and value of its bonds and stocks, the present as compared with the original cost of construction, the probable earning capacity of the property, under the particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case."

In San Diego Land Co. vs. National City, 174 U. S., 739, it was contended that in ascertaining the justness of the rates, the Court should take into consideration the cost of the plant,
87 cost of operation, including interest on borrowed money, the annual depreciation of the plant from natural causes resulting from its use, and a fair profit to the company. The Court said:

"Undoubtedly all these matters ought to be taken into consideration, and such weight be given them when the rates are being fixed as, under all the circumstances, will be just to the Company and the public."

In San Diego Land & Town Company vs. Jasper, 189 U. S., 439, the case last cited was approved wherein it was said that

"What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time being used for the public."

The Court then says:

"That is decided, and decided as against the contention that you are to take the actual cost of the plant, annual depreciation, etc., and to allow a fair profit on that footing over and above expenses."

It would not be useful for me to quote further from the cases, or to cite others, of which there are many, to the same effect. Suffice it to say that in the many cases examined by me during this investigation I have found none that tends to a departure from Smyth vs. Ames, supra, or lends countenance to the broad and unqualified contention of complainant. My conclusion can but accord with the oft repeated declaration that in an inquiry such as this the Court must ascertain the fair, present, reasonable value of the property, taking into consideration every fact and circumstance which will in any way throw light upon the subject, and having in view the just rights of both the company and the public.

So, in this case, after due consideration of the authorities, I conclude that prices at this time, being abnormal, should not be used as to so limit the determination of this question as to exclude other relevant facts.

Basis of Valuation.

The parties have presented, for my consideration in connection with oral testimony, the following: (1) cost of reproduction,
88 less depreciation, on the basis of present values; (2) cost of reproduction, less depreciation, on the basis of average values for the five years from 1915 to 1919, inclusive; (3) cost of reproduction, less depreciation, on the basis of average values for three years from 1915 to 1917, inclusive; (4) the company's records showing the amount of invested capital.

The reconstruction costs are applied only to structures and equipment. Allowances have, in each instance, been made for depreciation. The land has been valued at actual market value. To the depreciated values, thus ascertained, there has been added items covering engineering, contingencies, general expenses, taxes and interest during construction, stock accounts, and going value.

The estimates of experts called by the city exclude from calculation the items of "working capital," and "going concern" value which are included in the company's estimates.

There are slight differences in the estimates of what may, for convenience, be called "overhead" charges, but these are of no controlling importance. For instance, the company estimates 3% for contingencies—the city expert allows 4%. In the computation of taxes, the company's figures are based upon a three year period of construction, while those of the city are based upon a two years period. The structural cost on the five years basis, according to the city's figures, was found to be $4,643,079.21. The depreciation was 11.8%. Twenty per cent was added to cover "overhead" expenses; and the value of the real estate then added, with the result that on this basis, the value of the property was ascertained to be $5,014,017.38. Apparently the allowance for real estate was $97,950.00, against $98,251.00 in the company's figures.

The net result of the two compilations is $5,014,017.38 for the city, and $5,571,451.15 for the company.

By adding to the first the item of "going concern" value of $341,439.75 which, for reasons I shall state later, should be added to city's estimates, it would be brought up to $5,355,457.13; resulting
89 in a difference in the two of $215,994.03. This difference is reduced, however, by reducing the company- figures by computing depreciation on overhead structures (distribution), office equipment, automobiles, and horses and wagons. This depreciation is $11,365.97; so that the real difference between the two sets of figures is $204,628.05.

I have no details of the city's figures, and am therefore unable to find the cause of the difference, except to the extent that it may be affected by the computations of "interest during construction." There is, however, a material variance in the figures with respect to depreciation. Mr. Lewis, the city's expert, estimates this at 11.8%, while the company's estimate was 15.27%. In addition to these figures, I have the balance sheet of the Company for June 30th, 1919, showing assets of $5,323,900.20. (Tr. V. 5, p. 904.) It appears, however, that this includes $623,494.90 of superseded track and equipment, and should, to that extent, be reduced to arrive at a point where it can be considered with a view to a just result. This would leave the invested capital as $4,700,505.30.

The result of the company's estimates on the basis of 1919 values was $6,781,167.45, not including $124,169.01 claimed as the value of the franchise which, I think, for reasons hereinafter stated, should be excluded.

Working Capital.

The estimates of the defendants' experts exclude this item from their valuation, for the reason that complainant's current liabilities are in excess of the cash on hand; that it has no working capital. The complainant insists that it should be included.

I have included in the valuation found by me an item covering supplies and material on hand denominated "stock account" of $71,-639.90. This is sufficient "working" capital, at least, in the case of a street railway company that collects its charges in advance.
90 It may, and does, use its current revenues to do business on. If this company were to commence business today it would do so with a fixed and certain traffic of more than three million passengers monthly, with the charges paid in advance.

The balance sheet of June 30th, 1919, shows cash on hand $70,-355.65, and outstanding bills payable $100,000.00 (Tr. 5, p. 904). Interest on the bills payable is probably (as is usually done) being charged as an operating expense. To make a further allowance for "working capital" would place a double charge against the traffic.

Going Value.

The question of whether going value should be included in estimating the value of the property in a case of this kind was referred to in Knoxville vs. Knoxville Water Co., 212 U. S., 1, but no opinion was expressed of the propriety of doing so. In the Cedar Rapids case, 223 U. S., 655, the question was before the Court for decision, and it was said that the Supreme Court of the State took into account the fact that the plant was in successful operation, and that

"What it excluded was the good will or advantage incident to the possession of a monopoly, so far as that might be supposed to give the plaintiff the power to charge more than a reasonable rate."

citing Willcox vs. Consolidated Gas Co., 212 U. S., 19.

In the case of Des Moines Gas Co. vs. Des Moines, 238 U. S., 153, the Court said:

"That there is an element of value in an assembled plant, doing business and earning money, over one not thus advanced, is self evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use."

While nothing more was decided in that case than that the Master had, in fact, included going value in ascertaining the value of the property, yet the above quotation seems to have been understood by the Court, in the later case of Denver vs. Denver Union Water
91 Co., 246 U. S., 178, 192, as establishing affirmatively that going value should be included.

It is impossible for me to find a substantial ground upon which

to base a valuation of this element of a business. The Supreme Court has decided nothing more than that it should be included. That there is a value here which should be included no one can successfully controvert, but how is it to be valued? In the Des Moines case the Master valued the plant as one in "successful operation." When a valuation is made upon the basis of cost of reconstruction now, with "overhead charges," such as engineering, contingencies, general expenses, etc., allowed, it would seem that the valuation would, of necessity, include the idea that the plant was in "successful operation," and the Master in the case last referred to pursued that method. In the valuation found by me, while I have considered the cost of reproducing the property, and the value on the several bases submitted, I have given controlling effect to neither. Since this is true, I am unable to satisfy myself that I have given proper weight to this consideration; yet, I cannot say that I have not valued the property as a plant in successful operation.

While I am not satisfied with the testimony upon which this item is sought to be allowed, I have decided to include it. There is very little of certainty in cases of this kind, especially in matters of valuation. I am induced to do this, perhaps, from the opinion I entertain that the question of valuation is of minor importance to the ultimate decision of this case.

Mr. Tuttle explained the necessity of training men for the service, and estimated the expense necessary to that end at $34,650.00. The other item which goes to make up the company's estimate of going concern value of $341,439.75 (in one place it is stated to be $334,493.70), that is $306,789.75, he arrived at in the following way: Going value is that portion of the business which the company does which results from the development of the business due to the convenience of the service offered and of the presence of the convenience in the community. He illustrated that in 1913 when the lines were cut in two for construction purposes they had an interruption of the service with immediate decreases in revenues. Anything done to interfere possibly causes a certain part of them either not to ride at all, or to walk, or use some other method of conveyance, and, in order to determine the extent of that, he took the averages increase in passenger traffic for a period of five years when there were no disturbing factors; took the average increase in passenger traffic for that period, and in that way arrived at the probable, or normal increase for the year 1913. He applied that to the passenger records of the company and found that certain figure which represented what the increase should have been; what the business should have been under normal conditions, and then deducted from that the actual passenger traffic and found that in 1914, on account of interruption of the service, there was a loss of $102,263.25. This loss was from that portion of passengers who did not have to travel, but who did so because of the convenience of the service offered. There was no time during construction period that more than one-half of the traffic was blocked. For instance, the Avenue C line was cut in two and people from the West side could practically go anywhere in the business district without interference, so that one-half of the passengers would not be affected by the

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cut on that line. The same applied to passengers coming in from the East side of town. They cut some of the lines in two in outlying districts, but never had more than 50% of the lines under construction at one time. He assumed that the loss in revenue, due to interruption of the service, was not more than one-half of the total. The total amount of business attracted by the service was at least twice the actual loss, or $204,526.50. "We feel that that represents the percentage of traffic which was attracted by the convenience of the service; in other words, people that did not have to ride who could have done something else, but they actually did ride when
93 the service was convenient, acceptable to them; and when they had interruption and inconvenience they did not ride, they stayed at home." He assumed that the total amount of business which was then attracted by convenient service was $204,526.50. "I am not speaking about good will because we don't assume that in the Street Railway business, but simply the kind of business which is attracted by having a business there and having a convenient service." He assumed that it would take a three years period of construction to develop the business. "Now, if that development, that is, going value, through that period of construction—and we would have three years in which to develop that; we would have nothing at the beginning of that time, and have, at the end of it, our business fully developed; therefore, the average would be on an eighteen months basis, or one-half of the three years period, and that would make $306,789.75, that is going value from the development of the business on account of the convenience of the service." (Tr. V. 4, 556-558.)

Out-city Lines.

The Company operates 5.85 miles of track outside of the city limits (Tr. 2, p. 212), and the defendants contend that the inadequacy of the revenues of the company is due very largely to losses incurred in operating those lines; and insist that in determining the valuation and amount of operating revenues of the company in the test year of 1918 those losses should be added to the operating revenue, shown on the books, or, to accomplish the same result, deducted from the operating expenses, the idea being that the traffic within the city should not be required to bear the burden of losses incurred in the operation of outside lines. The company contends, on the other hand, that the system should be considered as one operating plant; the town considered of one town, one community, served by one company; and that the result of operation over the entire unit should be considered as one.

It appears that the corporate limits of the town covers
94 a territory six miles square. The distance from the middle of the square to the corners is 4.2 miles, and that none of the lines extending outside of the city limits go beyond the distance of 4.2 miles except the South San Antonio Line, on which an extra fare is charged beyond the city limits. They say that for the company to carry passengers within the city limits a distance of 4.2 miles for

five cents, by charging a greater fare for carrying a passenger an equal distance outside the corporate limits would constitute a discrimination, and that, of course, would be unlawful. My opinion is that there would be no question of discrimination in such a case and simply because the city requires the company to carry passengers six or seven miles within the city limits for five cents, no discrimination would be shown to passengers residing outside the city limits if they were charged ten cents, even though carried a less distance. I was inclined, in the beginning, to sustain the contention of the company in this respect, but I am required to yield my preconceived notion on the subject to the decision of the Supreme Court in San Diego Land & Town Co. vs. National City, 174 U. S., 739, 758, where the Court said:

"One of the points in dispute involves the question whether the losses to the appellant arising from the distribution of water to consumers outside of the city are to be considered in fixing the rates for consumers within the city. In our judgment the Circuit Court properly held that the defendant city was not required to adjust rates for water furnished to it and to its inhabitants so as to compensate the plaintiff for any such losses. This is so clear that we deem it unnecessary to do more than to state the conclusion reached by us on this point."

In valuing the property I have therefore excluded the value of out-city lines,—$106,000.00—(Tr. V. 2, p. 212) and in determining the result of operations in 1918, I have added the losses incurred in operating those lines to the operating revenues shown by the company's books.

Capital Investment and Superseded Property.

95 As above indicated, the books of the company show an invested capital (after deducting the value of the superseded property) of $4,700,505.30. It appears, however, that when the properties of the original companies was sold out under foreclosure, they were acquired by the San Antonio Traction Company, and in opening its books that company did not include the value of assets that had previously been dropped from the books of the old company, and these items, aggregating $234,471.58, were carried on the books of the San Antonio Public Service Company for the first time in its assets shown by the trial balance of September 1st, 1917. The trial balance of the previous day showed the assets to be $359,471.58 less than the trial balance of the following day. This difference was made up of items of $234,471.58 above mentioned, and $125,000.00 discount on bonds. (Tr. V. 3, pp. 411-413). Deducting said item of $234,471.58, the invested capital would be $4,466,033.72.

Valuation on Three Years' Basis.

The value of the property on the basis of value 1915 to 1917 is $5,350,460.55 (Tr. V. 4, p. 570) subject to deduction on account of

depreciation $609,307.97. From this should be deducted also the estimated value of outside lines $106,000.00, and working capital $100,000.00. The result is $4,535,152.58.

Valuation on Five Years' Basis.

The reconstruction cost on the five years' basis is $6,283,690.27. (Tr. V. 4, p. 568.) Depreciation is $711,239.13 (Exhibit 650), to which should be added depreciation on distribution, autos, and wagons, $11,365.96. There should also be deducted the value of the out-city lines of $106,000.00, and working capital $100,000.00, leaving the value on this basis $5,351,101.29.

Valuation on 1919 Basis.

96 The reproduction cost on basis of 1919 prices is $7,670,615.37 (Tr. 4, pp. 878-9). The depreciation on this basis is $889,447.91, without depreciating distribution, general office equipment, autos, horses and wagons. Depreciation on these items is $14,108.03. The result is a value of $6,667,061.23.

The depreciation noted on this table should be 15.27% instead of 17.16%, and deducting the items of working capital and value of out-city lines, we have a value of $6,561,061.23.

* * * * * * *

The testimony of Mr. Lewis is undisputed that the average prices used by him in determining the value of the property on the five years' basis was 40% to 50% higher than the average for the five years preceding 1914 (Tr., V. 5, p. 724); likewise, the testimony of Mr. Meriwether was that within the last two years labor had advanced 65% and that material and supplies had increased all the way from 50% to 400%. (Tr. 5, pp. 859-860.)

By reference to the authorities cited above, it will be seen that the value of the property must be determined in such way that it will be fair, right, and reasonable, both from the standpoint of the company and of the public, and after much thought devoted to this subject I have reached the conclusion that the most just and reasonable valuation I can find, having in view that which is just to the public and to the company, is the value based upon the three years' period. The values used in the five year basis were clearly 40% to 50% above values during normal times, and that basis called into use the values of 1918 and 1919 which, as shown by Mr. Meriwether's testimony, increased during that period over 1916 prices from 50% to 400%. In view of these facts and the other testimony in the record, that prices have not been normal within the past five years, I think the most reasonable basis is that of the three years' period.

I have therefore found that the value of the property at this time, including all items claimed by complainant, and excluded by the city, except working capital, and computing depreciation on distribution, automobiles, wagons, office furniture, etc., and deducting the

value of the out-city lines, to be $4,535,152.58. I might say,
97 in this connection, that the reasons assigned by the company for not including depreciation on the items of distribution, etc., was that they were not considered in computing the depreciation reserve, but this is no sufficient reason for not considering actual depreciation in ascertaining values. The property has actually depreciated, and the value is what we are attempting to arrive at, irrespective of any question of a depreciation or reconstruction reserve. Mere bookkeeping cannot interrupt the inevitable laws of nature.

Franchise Value.

The Company has insisted that I include in the valuation the item of $124,199.01 as the value of the franchise, and, in a way, they contend that I should value the franchise at $821,700.00, being the amount of value fixed by the city for taxation purposes.

It appears that the amount of $124,199.01 was paid out in the form of taxes on the franchise. It was, of course, paid out and charged to operating expenses, and I am able to find no authority to sustain the proposition that any item of operating expenses can be capitalized and the company be entitled to earn upon it. It has, therefore, not been included.

With respect to the item of $821,700.00, it may be said that the franchise value should be included, that is, as a general proposition. Yet, it does not follow that it should be included in this case. The company was granted the franchise upon the condition that it would pave between its tracks and 12 inches on each side, and between all double tracks. This the counsel say was a consideration paid for the franchise. This may be conceded to be true, yet, as I include the full value of the price thus paid, and more, I can conceive no possible theory upon which the franchise should be valued as
98 a separate item.

I am very much inclined to the opinion, though the point has not been suggested by counsel, that the cost of paving ought to be excluded and then the valuation of the franchise included. Inasmuch, however, as no testimony has been offered before me of the value of the franchise, I have, by including the paving in the valuation, fully covered the item. In this I think the result is all in favor of the complainant. Perhaps it was believed by the defendants that if the value of the pavement was excluded, that would require the inclusion of the franchise value, and that each would probably be of the same value.

Counsel argue (Brief p. 19) that the "value of the franchise should be included because the company has constructed and maintains the paving which is of no value to the company," but they overlook the fact that they have insisted on including this value in their estimates. The Company has "given" this pavement to the public, but, nevertheless, has kept it.

If the city has received anything for the franchise, I have not been able to discover it. It would seem as though the provision of the franchise ordinance requiring the company to do this paving was, as

counsel say, the consideration for the grant, from which it follows that it should not be included in the valuation at all. The truth is, if this be not true, the municipality, or the people who make up the community and pay the taxes and ride the street cars, would be better off if this provision had not been in the ordinance, for, in that case, the city could not have done the paving by the issue of bonds at 5% interest, whereas by inserting it and requiring the company to do the paving and including the paving in the valuation upon which the company is entitled to earn eight per cent, the public are paying three per cent more on the cost of the pavement than they would be doing
99 if the company had not been required to do this work. It is for this reason that I am very much inclined to think that the expense of paving the streets, with proper adjustments with respect to reconstruction, should be excluded from the valuation. Inasmuch, however, as the defendants have not raised this question, and the exclusion of the pavement from the valuation would require the inclusion of the franchise value, the question is unimportant. The franchise may be of equal value to the pavement, and this, I assume, is the reason why the point has not been suggested.

By agreeing to do the paving, the company simply in that way, paid for the franchise or easement over the streets; and the franchise or easement should be valued and not what was paid for them. The franchise value may be equal to the cost, or may be greater, but whatever it is, it should be, in some way, included. As no testimony has been adduced on the subject, I assume that the value equals the cost, and by including in the valuation all the pavement, I have sufficiently valued the franchise. It makes no difference whether it be called a valuation of the "pavement" or "franchise," for the result is the same. Both, of course, should not be included.

Jitney Competition.

The record in the case, Vol. 4, p. 465, shows that the Company lost, on account of jitney competition, from the year 1915 to and including the first four months in 1919, the following amounts:

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1915	$135,800.00
1916	211,500.00
1917	136,050.00
1918	83,900.00
1st 4 mo. in 1919	39,050.00

In computing the rate of return which the company would have earned during those years, under the rate ordinance, in order to test whether it is confiscatory, these losses were taken into consideration as being due, not to the ordinance, but to conditions over which the defendants had no control.

Losses Due to Construction.

Due to construction during the years 1913 to 1915 the company lost, due to interruption of traffic—decrease in business and increase of operating expenses—$363,701.19, and in testing whether the ordinance rate is confiscatory, these losses should be taken into account, and added to the revenue of those years.

Losses Due to Operating Out-city Lines.

In testing the confiscatory character of rates, in computing the returns of the company from 1913 to date, I have added to the revenues of those years the estimated amount of losses incurred in the operation of out-city lines. I have taken as the basis of these estimates the percentage of losses shown in the proportion as they bear to the passenger revenue for the year 1918.

101

Reconstruction Reserve.

The subject of the charge against gross revenue to cover what is called a reconstruction reserve brings out one of the principal points of the controversy, in connection with the calculations to determine the adequacy of the returns of the Company for the year 1918. I find that during that year the Company charged $10,000.00 a month to operating expenses, and credited this to the reconstruction reserve. The fund has not been actually set aside. The propriety of allowing this item, as an operating expense, under the facts, is seriously controverted by the defendants.

The Supreme Court, in Lincoln Gas Co. vs. Lincoln, 223 U. S., 349, says (p. 363), to determine the character and amount of such a fund, and as to how it should be created, preserved, and expended, (364) it would be necessary for them to have a full report upon past depreciation, past expense for reconstruction or replacements, and past operating expenses, including current repairs: That they should be advised as to the gross receipts for recent years, and just how these receipts have been expended. I understand the words "reconstruction and replacements," as there used, mean that made necessary by ordinary wear and tear, and not to include reconstruction and replacements made necessary by the requirements of paving: I shall, therefore, separate the two. In reconstruction and replacements I also include current repairs and maintenance, as these cannot be separated from replacements and reconstruction proper.

In view of the suggestions there made, I find,

(1) That from 1902 to 1919, inclusive, all necessary reconstruction and replacements was taken care of and charged in the books as operating expenses, and the property was thereby preserved to a condition of first class operating efficiency.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

(2) That during the reconstruction period, 1913 to 1915, reconstruction and replacements, necessitated by street paving, was
102 carried into the capital account,—$533,770.88.

(3) That from 1902 to 1919 certain of the cars became obsolete, or worn out from use, and were reconstructed. All expenditures made on this account were charged to capital,—$89,724.02.

The figures given in the two preceding findings represent the actual cost of superseded track and equipment, less the salvage value. (Tr. Vol. 4, p. 679.)

(4) The value of the various parts of the plant had depreciated 15.27%,—less than 1% annually. The detail of this depreciation is elsewhere shown in this report, in connection with the valuation. In operating conditions there has been no ascertainable depreciation. The amount expended in reconstruction and replacements, from 1902 to date, has been $1,873,535.91. This represents a fraction less than 13.7% of the gross revenue.

I insert here a detailed statement of the result of operations for all the years beginning with 1902. This detail shows gross earnings, operating expenses including power, roadway maintenance, transportation expenses, rolling stock maintenance, damages, other general expenses, and taxes. The item on the tabulation "credit to operating expenses for bonuses, etc.," refers to the bonuses given to induce the extension of the lines, and these were, from time to time, credited to operating expenses during the years indicated.

(Here follows paster marked page 103.)

104 It may be helpful to the Court in arriving at a satisfactory conclusion with respect to the reconstruction reserve to have before it a history of the development of the companies from the standpoint of capital invested. I therefore insert at this point the following tables. In the first column of the table is shown the amount of invested capital at the end of the year; the second column, the amount of additional investment made during the year; and, the third, construction during the year.

Year.	Investment at end of year.	Additional investment during the year.	Construction during the year.
1902....	$1,177,777.92	$.....	$69,052.79
1903....	1,255,491.52	77,713.60	48,939.87
1904....	1,370,668.94	115,177.42	123,631.29
1905....	1,593,156.05	222,487.11	216,868.42
1906....	1,684,461.53	91,305.48	68,042.22
1907....	1,817,231.30	123,769.87	152,214.62
1908....	1,887,434.26	70,202.96	28,625.80
1909....	1,991,796.01	104,361.75	143,092.82
1910....	2,225,645.03	233,849.02	201,272.74
1911....	2,344,948.89	119,303.86	125,608.28
1912....	2,423,375.62	78,426.73	89,179.04
1913....	2,818,127.52	384,751.90	449,584.67
1914....	3,419,813.49	601,686.97	472,567.88
1915....	3,885,283.05	465,469.56	449,405.20
1916....	4,498,283.83	613,000.78	643,144.86
1917....	5,200,533.58	702,249.75	271,674.14
		$4,003,756.76	$3,871,965.06

(Tr. 3, p. 321.)

105 Before adverting to the facts which bear upon this question, it is perhaps best to take in view the decisions of the Supreme Court which tend to throw light upon the propriety, necessity, purpose, and amount of such reserve, and the method of preserving it.

In Louisiana Railroad Commission vs. Cumberland Telephone Company, 212 U. S., 414, referring to this subject, the Court said:

"That it was right to raise more money to pay for depreciation than was actually disbursed for the particular year there can be no doubt, for a reserve is necessary in any business of this kind, and so it might accumulate, but to raise more than money enough for the purpose and place the balance to the credit of capital upon which to pay dividends cannot be proper treatment."

In San Diego Land & Town Company vs. Jasper, 189 U. S., 439, 446, the Court said:

"We will say a word about the opposite contention of the appellant, that there should have been allowance for depreciation over and above the allowance for repairs. From a constitutional point of view we see no sufficient evidence that the allowance of 6% on the value set by the supervisors, in addition to what was allowed for repairs, is confiscatory."

In Knoxville vs. Knoxville Water Company, 212 U. S., p. 1, 13, the Court observed that a public service company was entitled to earn a sufficient amount annually to provide not only for current repairs, but for making good the depreciation and replacing the parts of the property when they come to the end of their life; that

"The Company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property is kept unimpaired, so that at the end of any given term of years the original investment remains as it was at the beginning."

Standing alone, this is an approval at the contention of the Company in this case (at least on the general proposition) with respect to the propriety of setting aside and charging this fund as an operating expense; but, this was really not up for decision. The question being considered by the Court was whether depreciation, complete and incomplete, representing the impairment in value
106 of the parts of the plant then in existence, should be added to the present value of the surviving parts; and the observation quoted was in part the answer to that contention. The Court further said:

"If, however, a company fails to perform this plain duty and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon over-issues of securities, or of omission to exact proper prices for the output, the fault is its own. When, therefore, a public regulation of its prices comes under question the true value of the property then employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past."

For the Court to pass upon and reach a proper solution of this question it is necessary to consider past depreciation, past expenses for reconstruction or replacements, and past operating expenses, including current repairs; the gross receipts in recent years, and how they have been expended. (Lincoln Gas Company vs. City of Lincoln, 223 U. S., 349, 364.)

Much has been written by the various commissions, appointed to fix rates to be charged by public service companies, on this subject. The propriety of creating such a reserve seems generally to be recognized, but the reason and extent of it are much obscured. One of the practical difficulties seems to be in determining the basis of calculation, involving the amount that may properly be set aside and charged to operating expenses. In the discussion of the question, it is assumed that the plant has a useful life for a definite period, and it is loosely stated, as I think, that the object sought to be obtained is the accumulation of a fund which, at the end of the assumed period, will equal the cost of original construction. In other words, that at all times the actual value of the property, plus the reserve, shall equal the original investment. The expression is, that the end sought is to preserve the capital intact. I am unable to subscribe to such a theory. What the Company is entitled to do is not

to preserve the capital intact, but to preserve the physical condition of the property so that the operations can be conducted efficiently and at the least expense.

107 Referring to the testimony in the case: Mr. Lewis the expert called by the defendants, testified that in addition to the ordinary expenditures in day to day maintenance, a street railway company should set up a reconstruction or replacement reserve, and this was recognized by the Commissions. The extent or amount of this reserve would depend entirely on the amount expended annually in keeping up the property. If you commence with a new plant and spend nothing on it, the reserve should be a considerable amount. If good business judgment was used, the track and equipment kept in good operating condition.—100% efficiency,—then the amount which would be set aside should be small. "It would depend entirely on the amount you expended for maintenance in ordinary operation." (Tr. V. 5. P. 785.) If you spent in maintenance a sufficient amount to keep the property up to 100% efficiency, from an operating standpoint, the amount of reserve should only be a sum sufficient to take care of the equipment when it either becomes obsolete or destroyed by wear and tear. If the overhead properties are constantly being replaced by ordinary maintenance, the reserve should not be computed on that value. If the ties are being replaced from day to day, nothing should be set aside for their replacement. Some day a track will have to be replaced with another type of track to allow for paving, and in that event a certain sum, equal to the amount of the value of the track should be set aside. (Tr. V. 5, p-. 786-7.)

The theory of this reserve is to keep the investment intact. In other words, if the plant has depreciated 12%, there should be a reserve of that amount. In setting up the reserve, nothing should be allowed for past depreciation.

Q. By the Master: "Now, what effect does this circumstance have on the question of the propriety of a reserve fund at this particular time as applied to this Company,—that heretofore they have never maintained a reserve at all——" (prior to 1917) "—should a depreciation be set up now to cover past depreciation of the property?"

A. No, sir, I don't think anything that is past should be considered; it should be considered as taking care of the property on its present basis, if you are going to wipe the slate clean and start over."

Q. By the Master: Well, how can you do it, is what I want to know?"

A. "Well, that is a matter of opinion; one authority will say one — and another will say another."

108 Q. By Judge Brooks: "In that connection, under the practice of Commissions, doesn't that depend on whether they have paid out excessive dividends in the past"?

A. "That should have some bearing on it. If you had made a good big fat dividend and got away with it, why that would be one question, and if you had not I suppose the Court would view it in another light."

Q. By Mr. McMillan: "And make this generation pay for what the preceding generation got?"

By the Master: "Suppose the Company has drawn out dividends for a period of twelve or thirteen years, averaging 6½% to 7%, and set up no reconstruction reserve?"

Mr. Aubrey: "In addition to maintaining the property?"

A. "I don't quite catch the question."

Q. By the Master: "I say, suppose a company has, for a period of ten years, say, earned and paid an average dividend of 6½% or 7%, in addition to maintaining the property to a very high standard of efficiency,—what effect would that have upon their right now to set up a reconstruction reserve to cover existing depreciation?"

A. "I don't see how you could well establish a reconstruction reserve—commence to set up one now for something that has already happened. If you are going to set up a reconstruction reserve, it should have been started at the beginning. The commonly accepted method is to take about 20% of the gross receipts on the property of this class and out of that take care of your maintenance,—ordinary maintenance to keep the property in good operating condition, and the balance to take care of the reconstruction reserve. If you set aside 20% of your earnings it would keep your property in good condition, and the balance set up as a fund for replacement when this equipment should be displaced or reconstructed."

(Tr. V. 5, p. 787-789.)

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Q. By the Master: "Going back to the question I asked you awhile ago, I don't think you answered it: On the assumption that this Company has maintained its property out of the ordinary revenues and charged it to operating expenses,—has maintained the property to 100% efficiency,—and considering all of the elements in the plant that go to make up the plant, what amount of reconstruction reserve should be set aside to take care of obsolescence and the natural depreciation and destruction of the property in the course of operation?"

A. (omitting reference to requirements of bond buyers in this respect, etc.) "So that question of reconstruction reserve is tied in so closely with the amount that they actually expend and put in the property keeping the property in 100% service condition that you can't separate them".

(Tr. V. 5, p. 791-3.)

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Q. By the Master: "Then, where you keep your reconstruction and maintenance funds separately, the amount set aside for reconstruction will vary from year to year, depending on the amount that has been expended in maintenance?"

A. "The two are so closely tied together that I don't see how it is possible to separate them".

(Tr. V. 5, p. 793.)

In the application of the reserve in the case of reconstruction of track, the difference between the cost of the old track and the new should go to the capital account. The difference between the
109 cost of the old track and the salvage value would be depreciation and properly chargeable to the reconstruction reserve. (Tr. V. 5, p. 794.)

There ought to be set aside 20% of the gross receipts to cover maintenance and deferred maintenance,—to be placed together. The deferred maintenance should keep the capital intact. (Tr. V. 5, p. 795.)

The witness explained, by illustration, that the value of the property, plus the reconstruction reserve, should, at the end of any given period, equal the investment. (Tr. V. 5, p. 795-7.)

Q. By Judge Brooks: "This deferred maintenance, as I understand from the rulings of the Commissions and Courts, should cover wear and tear, casualty, obsolescence, and municipal requirements, that is true, isn't it?"

A. "It would cover obsolescence and wear and tear and the changes in the art; now, as to the municipal requirements as to changes in the art, etc., I don't know about that".

(Tr. V. 5, p. 798.)

Where it becomes necessary to remove a ballasted track because of paving, and replace it, this would be a municipal requirement, referred to awhile ago, and the difference between the cost of the old track and its junk value would be a proper charge against the reconstruction reserve. (Tr. V. 5, pp. 795-800.)

Q. By the Master: "I understand the theory of reconstruction reserve to be to keep the capital intact?"

A. "To keep the capital intact".

Q. By the Master: "So that the public service company will not take the chance and risk of its property being wiped out and at the end of the period have nothing. In other words, he has invested his money for the benefit of the public and the obligation of the public is to preserve that capital so it should not be impaired, isn't that the theory?"

A. "Yes, sir."

The witness then stated that if the original cost of the plant was five million dollars, and at the end of twenty years it was replaced at a cost of eight million, the difference, or three million dollars, would be capitalized. In the beginning, the reserve would be computed upon the investment. After the plant was reconstructed, the basis of the reserve, in the case mentioned, would be eight million dollars. (Tr. V. 5, pp. 800 et seq.)

Q. By the Master: "Then, when you call it 'replacement reserve' why you are using a term that in truth does not apply?"

A. "Well,—"

110 Q. By the Master: "But the rule that does apply is a depreciation reserve to cover actual depreciation?"

A. "You would call that a depreciation reserve."

Q. By the Master: "I understand that it is frequently referred to as a reconstruction reserve, as a depreciation reserve and as a replacement reserve, but if I understand the theory correctly it is a depreciation reserve and not a replacement reserve?"

A. "It is strictly depreciation,—so your property and your money on hand should equal your investment account".

Q. The Master: "Then that being true, should not your depreciation reserve be based upon the cost of construction,—the original cost of construction?"

A. "The original cost if it is obtainable".

(Tr. V. 5, pp. 804-5.)

Mr. P. L. King, the Auditor of the Company, testified that they set aside $10,000.00 per month for this reserve; the cash has not been set aside. This commenced in 1917. They had no reconstruction reserve prior to that time, except that they set aside a reserve before that, but turned it back into earnings, and paid it out in dividends. (Tr. V. 1, pp. 79-81.) Mr. Tuttle testified to the same effect. (Tr. V. 1, p. 121.)

Mr. Tuttle further testified that the basis upon which the reconstruction reserve is computed is the taxable values, estimated at 75%, and by adding 33⅓% to that, to get 100% value, including only depreciable property. (Tr. V. 1, pp. 114-16.) We figured 2.97% on this value. (Tr. V. 1, p. 117.) On this basis the reserve would be $121,097.10,—the valuation used was $4,077,343.57. The setting aside of the reserve was a mere book-keeping item. We are using the money in the business. Some of the fund has been used in track replacement, paving replacement on East Commerce Street, which has just been completed, and that item has been charged against this account. (Tr. V. 1, p. 120.)

Prior to 1914 the Company set up $2,000.00 per month, and this kept up the track work, and replacement work, at that time. We then had gravel ballast track, and it could be replaced piecemeal, at that time; it was not concrete like it is now. If we had no occasion to use this $2,000.00, it was turned back into earnings. (Tr. V. 1, pp. 121-122.) We took care of the items that should have been taken care of out of the depreciation account, out
111 of the maintenance fund up to 1914. During the reconstruction period we charged the cost of construction to the plant account, and credited that account with the value of the old material salvaged. (Tr. V. 1, pp. 122-3.) The old rails salvaged were sawed up and used for ties, and when this was done the value was charged to the capital account, because we had already credited it with the value of the rails. (Tr. V. 1, p. 124.)

In using the reconstruction reserve, if a car was destroyed by fire, the difference between the original cost and the salvage would be charged against the reconstruction reserve. If the original cost was $5,000.00 and the salvage $500.00, a charge of $4,500.00 would be made against the reserve. The capital account would be credited with $4,500.00, plus $500.00 salvage. Then, if a new car was purchased for $7,000.00, it would be charged to the capital account.

The result of the transaction would be to increase the capital account $2,000.00. (Tr. V. 2, 254–257.)

The replacement of poles is now charged to maintenance. (Tr. V. 2, p. 287.)

Mr. Tuttle further testified that it was necessary to maintain this reserve to meet the time when replacing existing gravel ballast track with concrete track and pavement, due to street paving, became necessary, and that the depreciation reserve could properly be used for that purpose.

Referring now to the holding of the Supreme Court in the Knoxville case, it will be observed that what the Court said had reference to the question of valuation, and not the expenses of operation, or the return to which the Company was entitled. As further indicating that the Court did not hold that this depreciation reserve should, in all cases, be charged against gross revenues, in the latter part of the opinion it was shown that "the net income, in any event, would be substantially 6%, or 4% after an allowance of 2% for depreciation". This indicates very clearly that a public
112 utility company is not entitled, in all events, to set aside a depreciation reserve and charge it against gross revenue, but there may be cases in which justice to the public would require that the company itself, out of operating revenues, should take care of this item. This is evidently the idea the Court had in mind when it used the language quoted above from San Diego Land & Town Company vs. Jasper. This leads me to the conclusion that the Supreme Court has not decided that, in every case, a public utility company is entitled to charge a rate sufficient to pay operating expenses, to create a depreciation reserve, and, in addition, to earn a fair return upon the value of the property employed in the public service; but, on the contrary, what the Court has said is that a depreciation reserve, necessary in all cases, may properly be included in the fair return.

For a full discussion of the subject, the Court is referred to the note to Kansas City Southern Railway Co. vs. United States, 52 L. R. A., (N. S.), pp. 1, 18 et seq. A brief reference to the contents of that note will suffice for the present purpose. The question of depreciation must be treated in two aspects.

"First, whether a sum representing past depreciation shall be deducted from the valuation of the property in ascertaining the basis for determining the fair income to which the corporation is entitled; and, second, whether, in ascertaining the net earnings of the corporation, the amount of depreciation in valuation of the property shall be deducted from the gross income."

With the first we are not concerned at this point. The second question is, whether depreciation is an expense of the business,—that is the question here involved. The difference between the two questions must be constantly borne in mind, for otherwise incorrect conclusions will result.

If the depreciation now being considered is to be treated as an operating expense of the business, the further questions arise,

how it shall be ascertained, and what amount shall be allowed in the particular case, involving, of course, the basis of calculation. The ultimate result of the process must also be ascertained. There must be a definite end to attain, just alike to the Company and to the Public.

113 Depreciation has been variously defined: For instance

"As the act or state of lessening the worth of any physical factor constituting property, caused by weather, time and use. And it has been said that it may be measured by the amount of money that must be spent for replacement in addition to the normal amount of maintenance regularly expended."

(62 L. R. A.-(N. S.)-18.)

This definition covers both ideas of the use of the word; if not, there are repugnant and inconsistent ideas involved in the definition. The idea of lessening of the worth of any physical factor caused by weather, time and use, does not harmonize with the idea that it is measured by the amount of money that must be spent in replacement in addition to the normal amount of maintenance regularly expended. The first refers to value, while the second refers to condition, and the implied adoption by the author of the note of that definition involves the confusion of idea that he warns against in the beginning. This same confusion of thought has led to the general statement by various Commissions that the object of the reserve is to preserve the capital intact,—that the value of the property plus the reserve shall at all times equal the investment. If this is what is meant, the theory falls of its own weight by the simple illustration that a given piece of property deteriorates in value to a material extent at the moment of its first use, but from the standpoint of use, there is no deterioration or depreciation. It is common knowledge that, considered from a standpoint of value, a piece of machinery, depreciates very greatly within a week; but certainly, that machinery being used by a public service company, the company could not, and should not, be permitted to create a reserve for the purpose of keeping the "capital intact."

The Supreme Court in the Denver case, supra, 248 U. S. 178, said that

"The cost of service includes the use of the plant, but, ordinarily, not its destruction, except through the slow process of wear and tear, and obsolescence, for which graduated depreciation allowances are made."

This expression seems to include nothing more than depreciation due to wear and tear, and obsolescence, which can be taken care of by a charge against gross revenue.

114 As indicated in the above note, the authorities cited, being the testimony of experts, and the reports of commissions, also include in this depreciation obsolescence and inadequacy.

"Obsolescence" is defined to be conditions resulting from unforeseen changes in the art, making necessary the installation of new ap-

paratus and equipment; and "Inadequacy," the conditions resulting from the increase of business requiring the replacement of apparatus more adequately fitted for the service. (Note 10, p. 18.)

I can find no substantial reason why a public service Company should be permitted to establish and maintain a fund, chargeable against gross revenue, to meet this condition of obsolescence and inadequacy, as there defined, and in that respect, to preserve the capital investment intact. The theory, perhaps, is properly to be considered by the rate making bodies as within their discretion, taking the broad view that such a course is in the interest of the public, but from the judicial and constitutional standpoint, where the exercise of no discretion is permitted, it finds no proper place. Such condition must be classed and treated by the Court as the ordinary risks incident to an enterprise of this character. If a public service company invests its money in an apparatus which in a short time becomes obsolete by reason of "improvements in the art," should it not be required to meet the resulting loss, rather than that it be imposed upon the public? If I invest my money in a building which becomes inadequate for its intended purpose, within a period of a few years, the loss is mine; why should not the same be true of one engaged in a public service?

"Those who invest their money in railroads, take the same chances that men engaging in other business do, of making profits from the carrying on of their business."

(Reagan vs. Farmers Loan & Trust Co., 154 U. S., 362-409.)

They enjoy that which I do not,—the right to exercise a public franchise; they are endowed with the very power of government, and yet they demand from the public itself, protection against
115 vicissitudes attendant upon private enterprise. It is no sufficient answer to reply that they are subject to regulation with respect to their charge, because their demand, if allowed, is entirely met before the point of return is reached.

The theorists and experts on this subject also include in the depreciation, which should be taken care of at the expense of the traffic, destruction of the property by storm, wind, etc., and the acts of God. And, likewise, legislation requiring the removal of parts of the plant to make way for prescribed improvements. This latter I shall discuss later in connection with the situation of this company. It is sufficient here, to say that I take no account of these things in this case.

The Commission cases of recent years abound with generalities on this subject, and it is reiterated that the depreciation reserve must cover wear and tear, etc., and add, as I have indicated, "to keep the capital intact." My mental capacity is unable to meet this idea, when I take into view that, notwithstanding the value of the various parts of the plant, such as this, begin to deteriorate from the first moment of their use, yet at the end of any given period the value, nevertheless, may have greatly enhanced. The plant may have cost ten thousand dollars a year ago, but because of the increased cost of labor and material used in its construction it may actually be worth more

today, from a value standpoint, than when new, even though there has been a depreciation in the value of the various parts. In that case the theory of a depreciation reserve, "to maintain the capital intact," goes to pieces. In this case I find that the property has depreciated 15.27% as compared to new constructions; yet the value of the plant as a whole is materially greater than actual cost. There is no basis, then, for the theory of "preserving capital intact." And so, too, if there should be a decrease in value, not due to wear and tear, in which case certainly there should be no depreciation reserve to protect against such a condition, and this for many reasons.
116 The plant may have been constructed at a time when labor and material were at the highest point. Decline in value is bound to come, and the public should not be required to anticipate and meet it.

The correct general rule is that the Company is entitled to set aside and charge as an operating expense a sufficient amount to cover current depreciation, due to weather, time, and use,—that is, wear and tear, obsolescence, and inadequacy; but not obsolescence and inadequacy due to improvements in the art, or required by increased traffic, nor to preserve the capital intact.

Two principal theories have been evolved by which the amount annually to be set aside for this reserve is to be determined; first, the straight line method, and, second, the sinking fund method. The basis of the first is to return to the company annually, an amount sufficient, at the end of the supposed life of the plant, to equal the value at the beginning; and the second, that there is set aside, in a reserve, annually, a sufficient amount, which, compounded, will at the end of the supposed life of the plant, equal the investment. The sinking fund method has been adopted by this company. I shall not discuss the arguments which have been made pro and con with respect to the two theories. It is sufficient for me to observe that both of them fail to take into consideration elements necessary to a proper solution of the problem.

The Supreme Court, in Lincoln Gas Co. v. City of Lincoln, 223 U. S., 349, 364, says, with reference to the determination of this question:

"The facts found are not full enough to at all justify this Court in dealing with this problem of a replacement fund. There should be a full report upon past depreciation, past expense for reconstruction or replacement, and past operating expenses, including current repairs. We should be advised as to the gross receipts for recent years, and just how these receipts have been expended. Then the amount to be set aside for future depreciation will depend upon the character and probable life of the property and the method adopted in the past to preserve the property."

We may assume that a public utility company is entitled to annually set aside sufficient to cover depreciation, due to wear and tear, and, perhaps, with respect to certain property, obsoles-
117 cence, and that this, as a general rule, should be based upon original cost; and then see, if it should be allowed in this case.

To begin with, both Mr. Lewis and Mr. Tuttle agree that a given per cent of the gross revenue should be set aside or expended in day to day maintenance, and to cover depreciation, or "deferred maintenance," as they express it. This varies from 18% to 20% of the gross revenue. The amount expended in day to day maintenance, and the reserve during the year 1918, was slightly in excess of 19%. Mr. Lewis says that the line of demarkation between ordinary maintenance and deferred maintenance is impossible of location; that the amount that should be set aside in deferred maintenance depends upon, and is necessarily controlled by, the amount expended in ordinary maintenance. It is a variable quantity. This is evidently one matter the Court had in mind in the Lincoln case. If 15% is used in maintenance, then only from 3% to 5% should go into the reserve account, and vice versa. But, in fixing these amounts, he lost sight of the fundamental idea that in any event, according to the theory, the basis should be the original cost of the depreciable property ("to preserve capital intact") and if so based the figures might be more or less than those given. It is the variable quantity, however, that has bothered me. For instance, taking the years 1915 to 1918, inclusive, as illustrative, it appears from the audit of Ernst & Ernst (p. 21) that the amount expended in maintenance for each year, was as follows:

1914	18.2%
1915	19.3%
1916	15.4%
1917	13.1%
1918	12.5%

The figures of the Company are different, but I am using these simply to illustrate; these are the percentages of gross incomes. It was during the years 1913 to 1916 that a large part of the track was reconstructed in concrete, which, no doubt, accounts for the lessened proportion of the gross revenues spent in maintenance in subsequent years.

118 The Company may spend 15% in ordinary maintenance, and, in that event, set aside from 3% to 5%. On the other hand, it may spend only 5% in maintenance and then apply to reserve, according to these witnesses, from 17% to 15%, or the whole amount may be spent from month to month, when nothing should be reserved. On the method pursued by the Company, the whole amount properly chargeable against gross revenue may be used in maintenance, and the reserve still be set aside, so that the two will greatly exceed a proper charge against the traffic—(Lincoln case, p. 364). Prior to 1917 a reserve was set aside and not used, and at the end of the year was converted back into earnings. There is nothing to prevent a repetition of this procedure in the future, and it seems to me that a proper regard for the public interest requires that the situation be met, if possible, by some other just method.

At this time there is, according to the figures of the Company, a depreciation in value, of 15.27%. The Company, however, prior to July, 1917, failed to set aside a reserve to protect against this evil

day, and the question now arises of the justness of its doing so at this time. It is said, however, that this was due to no fault of the Company; that the rates were inadequate for the purpose, and to pay a fair return, in addition to meeting operating expenses. I am unable to agree to this. The Company judges the "inadequacy" of the return in the first place, and, in my opinion, errs in its judgment. The record shows that from 1903 to 1912, inclusive, the earnings averaged 8.83%. The revenues in 1903 and 1904 were seriously depleted as the result of a strike of its employes, and were, therefore, abnormal years. If they be excluded, the average for the nine years was 9.97%. These figures disclose the error of judgment that the return was insufficient to enable it to set up a reserve to cover depreciation. That the meager results of operation for the years 1913 to 1918, inclusive, were not due to inadequacy of the rate, but to reconstruction and competition, is elsewhere shown in this report.

I quote the following from the report of the Public Service
119 Commission of New York, First District, in Metropolitan Street Railway reorganization case:

"If a Company does not reserve a sufficient portion of its revenues to replace capital consumed during the year, but not requiring replacement within the year, and then proceeds to treat the entire surplus as divisible profits, it is actually violating the law against the declaration of dividends out of capital just as effectually as though it sold stock and distributed the proceeds immediately in the form of dividends."

The question of what treatment the Court will give to a case of this kind was involved in Louisiana Railroad Commission vs. Cumberland Tel. Co., 212 U. S., 414, but not decided: They did say, though, that it could not be placed in the capital account, which was done here during the reconstruction period. It appears that in the past years dividends have been declared, but that the stockholders have taken additional stock in the Company, in lieu of the dividends. In other words, they have simply invested their dividends, including what should have been in reserve, in the property.

Now, what should be done with past depreciation? It cannot be taken care of out of future earnings. That is certain, because it would require the public, and not the stockholders, to restore the capital investment paid out in dividends. The stockholders should be required to replace it.

The Supreme Court of Washington, in a case similar to this, says:

"It is unquestionably true that the railway company is not bound to see its property gradually deteriorate in earning power and value without making provisions out of its earnings to keep its usefulness unimpaired; and that it can properly charge an annual sum to care for necessary depreciation and waste, and have such sum allowed in any determination of what is a proper return upon its investment, to be approximated in fixing its rates of carriage. But we cannot concede that in so doing it can make the traffic of any future year or years bear all the burdens of the deterioration of past years. Each year should carry the burden of its own wear and tear, and thus, when renewals become necessary, the burden is equally borne by all

contributing features." (Puget Sound Elec. R. R. vs. R. R. Com., 65 Wash. 75, 117 Pac., 739.)

But, the Company says, the reserve it is setting up is not intended to cover past depreciation. If the reserve is used at all it will, in the very nature of things, result in its application to past de-
120 preciation. It could not be used otherwise.

The fact that the stockholders have put back into the property more than they took out in dividends does not relieve against this condition. The vice lies in the fact that a proper reserve was not set up in the past. It could have been done, except, perhaps, in 1913 to 1916, and the stockholders have received fairly remunerative returns. As to the years 1913-1916, they were abnormal, as I shall show elsewhere, and afford no basis of determining anything in this case.

Mr. Tuttle testified that prior to 1918 depreciation was taken care of in maintenance, though, during the reconstruction period—1913 to 1916—these items were charged to capital. (Tr. V. 5, pp. 121, 122.) This constituted a capitalization of these charges.

The Company also says that it should be permitted to set up this reserve to meet the conditions in future of being required to remove existing gravel ballasted track and replace it with concrete track and paving.

Under the Franchise Ordinance of March, 1899, the Company agreed to reconstruct its tracks, and to pave between them, and twelve inches on the outside, and between all double tracks, with the same character of pavement as that used by the city, whenever the streets should be paved. It is, in part, to meet this "municipal requirement" that the reserve is now set up; and emphasis is laid upon the fact that this is necessary and proper. But is it proper? Did not the Company agree to do this in consideration of the franchise, and was not this provision inserted to save the tax payers the expense of doing the paving, rather than placing the burden on them in the form of increased fares? Did not the Company contemplate this condition when the franchise was granted? Why has no provision been made in the past to meet it? Is not the Company bound by this condition of the franchise? (Northern Pac. Co. vs. North Dakota, 236 U. S., 595; Atlantic, etc., R. R. vs. North Carolina R. R. Com., 206 U. S., 1, 22, 23.)

Heretofore the Company has provided the capital, as I
121 think it should have done, irrespective of the question of a reserve for the purpose; and it is a very doubtful question but that the expenditures, under that provision of the franchise, should not be computed in the valuation at all, but treated as a consideration for the grant, and not to be capitalized.

The foundation of the whole theory of a depreciation reserve is that a fund shall be set aside, and be maintained, for the purpose of taking care of maintenance which cannot be met from day to day. No such reserve has, in fact, been set aside. The Company has done nothing more than make a book entry to the credit of depreciation reserve, with a corresponding debit against gross income. The fund is not in hand, and when it becomes necessary to use money for this deferred maintenance, it must either come out of the then current

revenue, or by the investment of new capital, as has been done in the past.

My conclusions on this phase of the case are:

First. That the entire item of depreciation reserve should be disallowed; because it has not actually been reserved for the intended purpose. If allowed, the fund should be available for immediate use, so that in the future, when the Company is required to make expenditures, properly chargeable to it, it would not be required to borrow and capitalize the expenditure, as it has done in the past, or pay it out of current income.

Second. No allowance on this account should be made for current depreciation for gravel ballast track, overhead distribution structures, and office furniture, autos and wagons; for the reason that such items are constantly being replaced and charged to current operating expenses, as has been done in the past, and can be done in the future.

Third. No allowance should be made on this account for current depreciation of concrete tracks and pavements, rolling stock, buildings, shop equipment, etc., not covered by ordinary maintenance; because the obvious and necessary effect of its use would be to take care of past depreciation.

Fourth. No allowance on this account should be made for
122 anticipated reconstruction, due to street paving requirements, in the nature of tearing up and replacing gravel ballasted track; because the obligation to do so was assumed by the company in the franchise ordinance; and furthermore, to allow it would result in the capitalization of an operating expense,—for the company claims, and it is accorded the right here, to capitalize the value of the concreted track and pavement. It will doubtless be allowed to do so in the future. I see no reason why this item should not be handled hereafter as it has been handled in the past.

Fifth. The only amounts expended, from 1902 to date, which should have been charged to "deferred maintenance" were for the replacement of rolling stock—$89,724.02—and this was capitalized.

Damages.

The counsel for defendants have suggested that in ascertaining the result of operations for the year 1918, and in determining whether the company, under the ordinance, is earning an adequate return, I should deduct from operating expenses all payments made on account of damages. They have, however, furnished me with no authorities on this subject. I see no reason why this should be deducted. The company paid out in damages during 1918 the sum of $121,798.53. (Tr. 1, p. 51.)

Transfers.

Much testimony has been taken in the case on the subject of the provision of the franchise ordinance relating to transfers and the

effect of its elimination, and the elimination also of what is called "cross-town riding."

The evidence justifies the finding, and I find, that the elimination of transfers would result in increasing the net revenue of the company about $175,000.00 per annum,—and the elimination of cross-town riding would increase the revenue probably $75,000.00,
123 and possibly as much as $125,000.00. There is no method of determining with any degree of certainty the result that would follow from this, and it can be determined only by an actual trial. Mr. Tuttle estimated that the elimination of transfers and cross-town riding would increase the revenues of the company about $300,000.00 a year.

The result of eliminating the transfers and cross-town riding would not be materially different from that following an increase of fares to six cents.

Counsel for the city have suggested that I report my conclusions upon the question of whether, in case it be found that the effect of the enforcement of the ordinance is confiscatory, the court in its decree might not simply enjoin the transfer provision of the ordinance.

I conclude that the Court may not exercise its power in that way,—indeed, that it does not possess the power to exercise. If the effect of the ordinance is confiscatory and should be enjoined, the Mayor and Commissioners have a discretion to exercise whether they will increase the rate of fare generally, or eliminate transfers and cross-town riding; or to pursue any other course, the result of which will enable the company to earn that rate of compensation to which it is entitled. With the exercise of this discretion the Court cannot interfere. The authorities cited by me under the first proposition suggested conclusively show that the Court may not thus interfere with the exercise of legislative discretion. It can not determine that the elimination of transfers and cross-town riding is preferable to an increase of fares; nor, that an increase of fares is preferable to the elimination of transfers. Therefore, if the Court disagrees with the conclusion I have reached, that the injunction should not be issued, I conclude that its duty would be to enjoin the enforcement of the ordinance, and thereby leave the Mayor and Commissioners in a position to exercise their own discretion.

It is undeniable that the revenues of the company for the
124 year 1919, and possibly for several years, will be wholly inadequate to enable it to earn a fair return on the value of its property. The interest of the public would seem to suggest that some measure of relief against existing conditions should be given, though I am of opinion, as indicated above, that the Court is powerless to grant it. The Mayor and Commissioners certainly may do so. The public interests demand and require the continued operation of these lines of transportation, and a cessation of the business would seriously impede and retard the industrial progress and development of the city,—a matter of great public concern; and the same result would follow from a deterioration in the service below the present high and efficient standard.

While the defendants charge in their answer that the properties are not prudently and economically managed, there is nothing in the vast volume of the record before me to sustain it. There is no evidence that any officer or employee is paid more than the service rendered by him is reasonably worth; nor, that in any respect is there, or has there been, improvidence in any feature of the management.

Unless a measure of relief is granted, though it be of a temporary nature only, one of two things must happen short of insolvency,—(1) the pay of the men must be reduced, or, (2) the service must deteriorate. Certainly under the present conditions the wages of the men ought not to be reduced, and the public should not be required to suffer the latter. And it should not be expected that the owners of the property should continue its operation upon the present meager return, though they might be required to do so.

The depletion of the revenue is not due to the fault of the company, the Mayor and Commissioners, or the public at large, and it is a question of legislative discretion rather than judicial decree whether the company shall, to any extent, be relieved from them.

The elimination of transfers and cross-town riding would
125 perhaps affect no more than 28% of the traffic, while an increase in fares would affect every passenger. Upon first impression it would seem that the former is preferable, but that may not be true, for, in that case, the 28% would be required to bear the entire burden of the increase in revenue, while in the other case it would be paid by all the traffic. So that, it is a serious question even from a legislative standpoint which of the two remedies is preferable. This illustrates the impropriety of the Court interposing its decree to require the Mayor and Commissioners to, in effect, repeal the provisions of the franchise ordinance relating to transfers, and pass another ordinance authorizing the company to eliminate cross-town riding.

My recommendation, therefore, is that if the Court is of opinion that the ordinance should be enjoined, it should not limit the decree to a part of the ordinance only.

The One-man Car.

The defendants emphasize the fact that the complainant has not undertaken the operation of what is called the "one man car,"—denominated by one of the witnesses as the "jitney killer."

The testimony is that this is a newly patented car known as the "Birney" car. It has been on the market about two years. A number of them have been in operation on the lines at Fort Worth for about eighteen months, and the evidence here justifies the conclusion that there is great economy in their operation as against the operation of the double truck cars used by this company. Mr. Meriwether testified that these cars cost about $5,300.00, while Mr. Lewis estimated their cost at $7,000.00. The Dallas Company, of which Mr. Meriwether is the General Manager, is now operating 12 of those cars. He testified that in a period of three years the saving

in cost of operation would equal the cost of the car, plus interest on the investment. Mr. Lewis testified to the same effect. Mr. Lewis, however, testified that it would take a study of operations on the particular line to arrive at how many of the present cars
126 should be replaced,——

Q. "The result is, then, that you cannot approximate what saving the company might bring about within the next three years by making those changes?"

A. "No, sir."

(Tr. 5, p. 743.)

Q. "Mr. Lewis, could you say here, now, without going to San Antonio and carefully analyzing the traffic on any one line, whether it would be a proper thing to put one man cars on that line?"

A. "No, sir, it would be necessary to study the conditions."

Q. "To study the conditions on that line?"

A. "Yes, sir, study the conditions on that line and see."

(Tr. 5, p. 776.)

Q. By "Mr. McMillan: I will state for your information, in connection with what you personally know, that the evidence shows there are a number of lines which operate out into the country, several of them going distances of a fraction of a mile to over a mile outside of the city limits, a large number of the lines operating through sparsely settled districts; all of them centering in to the business part of the city—the two main streets, Commerce and Houston, are intersected at various places, such as the Plazas, Navarro Street, St. Mary's Street, Flores Street, and Main Avenue, by street car lines. Now, I would like to know if, in your opinion as a man conversant with the operation of street cars, there is any reason why the safety cars or one-man cars could not be operated upon some of the lines within the city of San Antonio?"

A. "Why, I can see no reason why the one-man safety car could not be operated on any line where they have the ordinary size single truck car at the present time."

(Tr. 5, p. 825.)

Mr. Meriwether testified in accordance with the opinion expressed by Mr. Lewis,—that he could not testify as to the practicability of operating one-man cars on any one line without a previous traffic survey.

Considering all the testimony, I am unable to find that there has been any lack of diligence on the part of the company in its failure to operate one-man cars on any of its lines. It may be practicable and it may not be so. It depends on conditions of traffic with which neither Mr. Lewis nor Mr. Meriwether were familiar.

The conditions at San Antonio are very different from those in Dallas. In Dallas practically all, if not all, the cars operate through the downtown districts on three streets, while in San Antonio they

all, with only one exception that I now recall, operate on
127 two streets. Aside from this it is shown that the streets in Dallas are very much wider than the two main business streets in San Antonio. The Dallas streets are of sufficient width that a vehicle may pass between street cars passing on the street and a vehicle standing at the curbing; while that condition does not exist on either of the streets in San Antonio. The result of the narrow streets tends more to a congestion of traffic, and it is extremely doubtful from the testimony I have heard that the one-man cars could be successfully operated in San Antonio without a serious congestion of traffic in the downtown district.

I can conclude nothing from the testimony before me but that these cars might possibly be operated on these lines. If they can, the result would be a very material decrease in operating expenses.

Conclusion.

My conclusion is, and I recommend to the Court, that the bill be dismissed.

In the event the Court should disagree with the conclusion reached by me with respect to the power of the Court to interfere with and enjoin the rate ordinance because of the changed conditions since its passage, then I recommend that the injunction be granted, the decree, however, to provide that the defendants, the City of San Antonio, its Mayor and Commissioners and its City Attorney, may apply at any time to the Court, by bill or otherwise, as they may be advised, for a further order or decree whenever it shall appear by reason of a change in circumstances, the rate of fare prescribed by the ordinance is sufficient to yield to the company a reasonable compensation for the services rendered.

I transmit with this report all of the testimony and exhibits adduced before me,—the testimony being comprehended in the five volumes pages 1 to 919, inclusive, and the exhibits in three volumes, pages 1 to 730;—with certain omissions indicated on covers,—and exhibits marked "D", "E", and "F".

128 I identify these volumes by my signature on the front page of each.

I have endeavored to prepare the report, both as to form and contents, in such way that if there should be an appeal it will not be necessary for the party appealing to include in the transcript on appeal the large volume of testimony taken, and the exhibits. If it shall become necessary to appeal the case, any additional record desired can probably be either supplied by stipulation of the parties, or embodied in a supplemental report, as the parties may prefer.

Respectfully submitted,

FRANK H. BOOTH,
Special Master.

San Antonio, Texas, August 23, A. D., 1919.

Endorsed: The United States District Court, Western District of Texas, San Antonio Division. No. 214—Equity. San Antonio

Public Service Company vs. City of San Antonio, et al. Report of Special Master. Filed August 27th, 1919. D. H. Hart, Clerk U. S. Court, by A. I. Campbell, Deputy.

129 In the United States District Court for the Western District of Texas, San Antonio Division.

No. 214, Equity.

SAN ANTONIO PUBLIC SERVICE COMPANY

vs.

CITY OF SAN ANTONIO et al.

Plaintiff's Exceptions to the Report of the Special Master.

Now comes the plaintiff, the San Antonio Public Service Company, and files the following exceptions to the report of the Special Master in Chancery, Frank H. Booth, Esq., filed herein on the 27th day of August, 1919, to-wit:

First. Plaintiff excepts to the legal conclusion found by the Master to the effect that the Court is without jurisdiction to grant the relief herein prayed for and that therefore the bill filed should be dismissed, because:

(*a*) This Court has already held that it has jurisdiction to grant the relief sought, and no such question was ever referred to the Master.

(*b*) Said conclusion is an erroneous statement of the Law.

(*c*) The legal conclusion that an ordinance regulating fares, which was reasonable when passed and which then allowed the Company to earn a fair return cannot be enjoined although it later becomes unreasonable through increased cost of labor and materials and other expenses of operation, because said changed conditions were not caused by the City, is an erroneous statement of the law; and the Master, having found that, because of such changed conditions since the passage of the ordinance, the plaintiff is not now earning and cannot earn a fair return on the value of its property devoted to the public use, should have found and recommended that all the ordinances referred to in plaintiff's bill and the amendment thereto, which would prevent plaintiff from raising fares to such a point as will bring it a fair return on its property, should be enjoined.

(*d*) The proposition of law stated by the Master to the effect that the Court has no jurisdiction to enjoin an ordinance if it was reasonable when passed although it has now become unreasonable and denies a fair return because of increased cost of labor, material and other operating expenses, is an erroneous statement of the law.

(c) This court has held that the fare provision of the ordinance of March 16th, 1899, does not constitute a contract between plaintiff and the city but was intended as a mere regulation, and the Master finds in his report that the company is not now earning and cannot earn at a five cent fare a reasonable return on its property devoted to the public use and the undisputed evidence shows that the plaintiff applied to the Mayor and Commissioners for permission to raise its fares and this application was arbitrarily and unjustly denied and the Master's findings and the undisputed evidence show that plaintiff is being compelled to use its property for the public benefit without any fair return and is thereby being deprived of its property without due process of law and the Master's conclusion of law that plaintiff can have no relief from this condition simply because the fare
130 provision of the ordinance of March 16th, 1899, was reasonable when passed and the city is not responsible for changes in the conditions of the country which have caused greatly increased operating expenses, is an entirely erroneous conclusion of law.

Second. Plaintiff excepts to that part of the "Statement of the Case" in the said report which states that this suit was instituted by the complainant seeking to enjoin the enforcement of an ordinance adopted by the City Council on March 16th, 1899; whereas the fact is, and the Master should have found and stated, that the complainant seeks primarily to enjoin the ordinances of March 28th, 1918, and October 3, 1918, which prohibit the complainant from raising its rate of fare without the consent of the City Council and provide severe penalties and the forfeiture of its charter if it should attempt to do so. The complainant also prays for an injunction restraining the enforcement of sections 20 and 64, Chapter 47, of the Revised Criminal Ordinances of San Antonio, and any other ordinances referred to under color of which the plaintiff might be prevented from raising its fares. The plaintiff's contention, as shown by its original bill and the first amendment thereto, is that all previous ordinances were repealed, so far as they affected the rates which might be charged by plaintiff, by the ordinances of October 3rd, 1918; and complainant seeks an injunction against the earlier ordinances as a safeguard against action by the City under color of such ordinances. The Special Master should have so stated the case instead of erroneously stating it in the manner set out.

Third. Plaintiff excepts to that part of the "Statement of the Case" in the said report which states that the controlling question in the case is complainant's contention that it is entitled to an injunction to restrain the enforcement of the provisions of the franchise ordinance of March 16th, 1899; whereas the fact is, and the Master should have so found and stated, that the controlling question in the case is the complainant's contention that it is entitled to an injunction to restrain the enforcement of the ordinances of

March 28th, 1918, and October 3rd, 1918, and that it asks
131 for an injunction against sections 20 and 64, chapter 47, of the Revised Criminal Ordinances of San Antonio, and the ordinance of March 16th, 1899, respectively only in event it be found that the rate provisions therein are not repealed or that they prevent plaintiff from raising its fares.

Fourth. Plaintiff excepts to the said report in that the Master, throughout the said report, completely ignores the ordinances of March 28, 1918, and October 3rd, 1918, prohibiting complainant from raising its rate of fare and providing severe penalties and the forfeiture of its charter if it should attempt to do so, whereas plaintiff's prayer for an injunction against the enforcement of the said ordinances is the controlling issue in the case and the Master should have made his findings of fact and conclusions of law in reference thereto.

Fifth. Plaintiff excepts to the second finding of fact in the said report, on pages 9 and 10 thereof, in that the said finding is in all respects unsupported by and contrary to the evidence of record in the cause, and the several conclusions and figures therein found are computed on an erroneous and improper basis. Without limiting the breadth of the grounds of exception given in the preceding sentence, plaintiff shows in exception to the said finding the following additional grounds:

(a) All of the percentages therein found as representing the operating revenues for the years therein named are computed on an erroneous and improper basis, in that no account is therein taken of the true value for the said respective years of complainant's property devoted to the public use in its street railway business.

(b) All of the percentages therein found as representing the operating revenues for the years therein named are computed on an improper basis in that no account is therein taken of the annual depreciation of the complainant's property taking place in each of the said respective years.

(c) Even disregarding the considerations stated in the preceding two paragraphs, which considerations however, should not be disregarded, there is no evidence whatever that the plaintiff earned an average dividend of 8.83%, but on the contrary the undisputed evidence shows that even on the erroneous basis of computation adopted by the Master, the average dividend earned during the period named is no more than 8.19%. The only evidence on this point is the table shown on page 321 of the stenographic report of the evidence, and the Master made an incorrect computation in arriving at the average earnings for the years referred to.

132 (d) The percentages therein found as representing the operating revenues of the plaintiff for the years 1917, 1918 and 1919, are, in addition to the grounds already given in paragraphs

(a) and (b), supra, erroneous for the reason that in arriving at the said percentages the Master did not allow as an operating expense the amounts charged to the reconstruction reserve by the plaintiff during those years.

(c) That the percentage therein found as representing the operating revenue for 1919 is, in addition to the reasons given in the preceding four paragraphs, erroneous in that it is based only on the value of the property situated within the city limits and not on the true value of all the plaintiff's property devoted to the public use in its street railway system.

(f) The said percentage therein found as representing the operating revenue for 1919 is, in addition to the reasons given in the preceding five paragraphs, erroneous for the reason that in computing said percentage the special master deducted the supposed losses "incurred in operating the outside lines."

Sixth. Plaintiff excepts to the third finding of fact in said report, on page 10 thereof, in that said finding is in all respects arrived at on an improper basis and is unsupported by and contrary to the evidence of record in the cause. Without limiting the breadth of the ground of exception given in the preceding sentence, plaintiff shows as additional grounds of exception to the said finding the following:

(a) The several sums therein found as representing the invested capital for the years therein named, separately and as an average, are erroneous in that they do not represent the true value, for the respective years and average of years, of the complainant's property devoted to the public use in the operation of complainant's street railway system, all of which is more specifically shown in the ninth exception herein.

(b) The said several sums therein found as representing the invested capital for the years and average of years therein named are, in addition to the reasons given in the preceding paragraph, erroneous in that they do not include the proper allowance for working capital and do not include the element of going concern value.

(c) That portion of the said finding which eliminates $623,494.90 from the invested capital is, in addition to the grounds given in the preceding two paragraphs, erroneous and improper because the plaintiff was entitled to have this amount considered as a part of its invested capital, especially $535,000 thereof, because said latter amount was expended for track and construction that was perfectly good for its own use but which it was required by the city to replace in order that new paved streets might be built and a construction suitable to said character of streets built therein. This is an expense caused by
133 municipal requirements and should not be excluded from plaintiff's invested capital.

(d) The said sum of $535,000 represents the value of property destroyed at the instance and command of defendants, and defend-

ants cannot now be heard in a court of equity to deny that said sum is a just charge to plaintiff's capital.

(*e*) There is no evidence in the record to support the several sums therein found as representing supposed losses sustained by plaintiff in the operation of its so-called out-city or outside lines.

(*f*) The several sums therein found as representin- the operating revenues for the years therein named are, in addition to the other reasons in the paragraphs of this exception, erroneous in that no account was therein taken of the actual annual depreciation which complainant's property underwent during respective years, and in that the amounts charged by plaintiff to reconstruction reserve were not allowed by the Master as an operating expense.

Seventh. Plaintiff excepts to that portion of the third finding in the said report, on page 10 thereof which sets out that the operating revenues for the years 1917-1918 were $291,517.53 and $213,669.14 respectively, and says that said finding is unsupported by the evidence, and the evidence shows that the net operating revenues for said years were only $141,517.53 and $93,669.14 and said finding of the Master is especially erroneous in that he excludes the amount set aside by plaintiff for reconstruction reserve fund in each year as an operating expense and therefore includes said amount in operating revenues found by him.

Eighth. Plaintiff excepts to the fourth finding in the said report, on page 10 thereof to the effect that but for the losses named in the third finding the average earnings for 1913 to 1915 would have been 6.3% and for 1916, 6.7%; 1917, 8%; and 1918, 7%; because

(*a*) Said finding is irrelevant and immaterial to any issue in this case.

(*b*) It is speculative and it is an incorrect method of arriving at what the earnings would have been in any year by eliminating such losses as are set out in the third finding, and,

(*c*) In arriving at said figures no allowance has been made for annual depreciation which the evidence shows should be accounted for in arriving at earning percentages.

(*d*) Said finding is unsupported by the evidence herein.

Ninth. Plaintiff excepts to the fifth finding on page 11 of the said report to the effect that the value of plaintiff's property within the city limits is only $4,535,152.88, because:

134 (*a*) Said finding is wholly without evidence to support it.

(*b*) The report shows that said finding is based on average prices for the years 1915, 1916 and 1917, and there is no evidence to show that said property could be reproduced at this time or at the time of this hearing for anything like that amount, and the evidence offered by plaintiff as to reproduction cost under present

prices stands undisputed in this record and shows that the reproduction cost would have been under under said prices the sum of $6,781,167.45.

(c) Said finding disregards the property outside of the City, and under the evidence of this case the whole system should be treated together and the entire value of the property found together.

(d) Said finding, as shown by the report, is based on cost prices for the years 1915, 1916 and 1917, and the undisputed evidence shows that the cost of reproduction at the present time is much higher than it was in said years, and the testimony offered by plaintiff to the effect that there was no prospect of the cost of reproduction, and especially the cost of labor and material, declining for a number of years, stands undisputed and the City offered no evidence whatever to show that there was any probability of the cost of labor and material declining for a number of years and the act of the Master in adopting the prices for the years 1915, 1916 and 1917 is arbitrary and unwarranted and without any evidence to support it.

(e) Said fifth finding is unfair and unjust in disregarding the prices for the years 1918-1919 and if any other prices are to be considered or can be considered under the law than the prices at the present time, then the fair and just method would have been to have taken the average prices for five years which was shown both by plaintiff and by the City and under the evidence as shown by plaintiff the cost of reproduction less depreciation on the basis of prices for five years would have been $5,571,451.15, and under the evidence of the defendants herein the cost of reproduction less depreciation on said basis of five years would have been $5,014,017.58, and the arbitrariness and unjustness of the finding is shown by the fact that it was never contended by either the plaintiff or the defendants that the value should be based on prices for the years 1915, 1916 and 1917, and the only evidence offered by defendants for the basis of value was that offered on the basis of the average prices for the period of five years including 1915, 1916, 1917, 1918 and 1919.

(f) Said finding is erroneous in not allowing anything for working capital and under the evidence shown by plaintiff an additional sum of $100,000 should be added therefor.

(g) Said finding is erroneous in not allowing anything for franchise value and under the undisputed evidence the sum of $821,700, being the value thereof assessed by the City and on which the plaintiff has been compelled for a number of years to pay taxes and on which it is now paying taxes, should be added, and in any event the sum of $124,199.01, being the amount of taxes plaintiff has been compelled to pay the city on said franchise, should be added.

Tenth. Plaintiff excepts to the fifth finding of fact in the said report, on page 11 thereof, because it is practically based
135 on cost values and deducts depreciation, whereas depreciation should not be deducted when cost is made the basis

of value unless it be shown that the Company had had sufficient earnings above a fair return to set aside a depreciation reserve fund and has failed to do so, and the undisputed evidence in this case shows that the company never at any time had sufficient net earnings to pay a reasonable dividend and set aside a depreciation reserve fund, and especially is this true since the year 1912, and since that year the company has earned an average return of less than 3% per annum.

Eleventh. Plaintiff excepts to the fifth finding of fact in said report, on page 11 thereof; because the Master arrives at the value therein found after deducting depreciation and yet holds in his report that the company is not allowed to set aside a reserve fund to provide for depreciation, and clearly, under the law, if depreciation is to be deducted from the value of the property, then the company should be allowed to set aside a sufficient reserve fund to provide for it, and the reserve fund already set aside should be added to the value of the property.

Twelfth. Plaintiff excepts to the seventh finding of fact in the said report, on page 11 thereof, in that said finding is in all respects arived at on an improper basis and is unsupported by and contrary to the evidence of record in the cause. Without limiting the breadth of the grounds of exception given in the preceding sentence, plaintiff shows as additional grounds of exception to the said finding the following:

(*a*) The statement therein that the gross revenue of the company for the year 1919 will be practically the same as for the year 1918, that is, $1,591,190.50, is erroneous and is contrary to and unsupported by the evidence; because the undisputed evidence shows that for the first four months of 1919 the total receipts or gross revenue were only $631.42 more than they were for the first four months of 1918, that during the months of May and June, 1919, there was a decrease in gross revenue of $13,993.28 under that of the same period of the year 1918, and that the total gross revenue for the year 1919 will be approximately $55,973.12 less than it was for the year 1918.

(*b*) The sum of $1,377,581.36 therein found as representing the operating expenses for the year 1918 and the estimate thereof of $1,456,241.31 for the year 1919 are erroneous and unsupported by the evidence.

136 (*c*) The sum of $1,377,581.36 therein found as representing the operating expenses for the year 1918 and the estimate thereof of $1,456,241.31 for the year 1919 are, in addition to the reasons given in paragraph (*b*), supra, erroneous for the reason that said sums do not include the amount of $120,000.00 charged by plaintiff to its reconstruction reserve in each of the said years respectively, and for the reason that the said sums include no allowance for the depreciation of plaintiff's property during the said years.

(*d*) The sum of $134,949.19 therein found as representing the estimated operating revenue for the year 1919 is computed on an improper basis and is contrary to and unsupported by the evidence of record in the cause.

(*e*) The sum of $134,949.19 therein found as representing the estimated operating revenue for the year 1919 is erroneous because it is derived from the sums therein found as representing the estimated gross revenue and the estimated operating expenses for the year 1919, both of which sums are incorrect and erroneous for the reason set out in paragraphs (*a*), (*b*) and (*c*), supra.

(*f*) The sum of $134,949.19 therein found as representing the estimated operating revenue for the year 1919 is contrary to the evidence because the undisputed evidence in this cause shows that the total receipts for the year 1919 will lack at least $38,000.00 in paying the actual operating expenses even if the total receipts be the same as for the year 1918. We refer particularly to the evidence on pages 232-237 of the stenographic report of the evidence. Further, as stated in paragraph (*a*), supra, the total receipts for the year 1919 will not be as great as they were in the year 1918.

(*g*) The sum of $297,949.19 therein found as the estimated operating revenue for the year 1919 but for competition and the supposed losses in operating the outside lines is erroneous (1) because it is derived from the figure $134,949.19 which, as shown in paragraphs (*d*), (*e*) and (*f*), supra, is incorrect and erroneous; (2) because there is no basis in law or in the facts of this cause for excluding supposed losses from competition; (3) because there is no basis in law or in the facts of this cause for excluding the supposed losses from the operation of so-called outside lines; (4) because there is no evidence in the cause that any such sums as embraced in said finding is lost by reason of the operation of outside lines; and (5) because it is arrived at on an improper basis in not considering plaintiff's entire street railway system as one system, and in separating that portion of the lines outside the city from said system.

(*h*) The sum of $297,949.19 therein found as representing the estimated operating revenue for the year 1919 is, in addition to the reasons heretofore given in this exception, incorrect and erroneous because supposed losses from jitney competition and from operating the lines outside the city were deducted from operating expenses in computing said operating revenue.

(*i*) The statement in said finding that but for competition and losses in operating the outside lines the operating revenue for 1919 would be 6.42% is incorrect, and erroneous (1) because it is based on the figure $297,949.19 which is incorrect and erroneous for the reasons heretofore pointed out in this exception; and (2) because it is based on a valuation of plaintiff's property of only $4,535,152.88 which is incorrect and erroneous for the reasons pointed out in the ninth, tenth and eleventh exceptions, supra.

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Thirteenth. Plaintiff excepts to the eighth finding of fact in said report, on page 11 thereof, to the effect that 8% is a fair return, because:

(*a*) The uncontradicted evidence in this case shows that the average net earnings of business and industrial concerns situated in San Antonio are from 10% to 40% and that the average commercial rate for secured loans is 8%, and the Master's finding does not take into consideration or allow anything for the risks attendant upon the operation of the street railway business and the uncertainty as to whether it will make said return.

(*b*) The undisputed evidence in this case shows that 10% would be a fair return. The only witnesses who testified on the question of a fair return were J. N. Brown (record p. 146), Franz Groos (p. 166, R. L. Ball (p. 379, and W. W. Collier (p. 392) for plaintiff, all of whom gave as their opinion that 10% to 12% would be a fair return. The only two witnesses for the City were Grover C. Bland and J. E. Lewis both of whom lived in Dallas and neither of whom claimed or pretended to be familiar with local conditions in San Antonio or with the customary rate of interest therein or with the earnings of business enterprises, while all the witnesses above referred to for plaintiff were experienced business men and bankers living in San Antonio.

(*c*) Under the undisputed evidence and under the law of this State 10% should have been fixed by the Master as a fair return.

Fourteenth. Plaintiff excepts to the first conclusion of law in the said report, on page 18 thereof, on the following grounds:

(*a*) The said conclusion does not correctly state the law.

(*b*) The said conclusion is incorrect and incomplete in stating that the "commission may do anything, or prescribe any rule or rate they please, within the limit that the act done, rule or rate prescribed, shall not operate to deprive the regulated person or corporation of property without due process of law or deny to them the equal protection of the law," because the said conclusion neglects to state the true and correct principle of law that, where a city commission is endowed with the exclusive power to regulate rates, the law imposes upon such commission the duty, upon being shown that the rate enforced by them is unreasonable and confiscatory, to raise the prescribed rate to such a point as will not be confiscatory, and when the law imposes upon a discretionary body the duty to do a particular thing upon determining that certain facts exist, and when reasonable inquiry shows that there is no reasonable ground for any conclusion other than that the conditions precedent to the performance of the duty exist, but the decision is made contrary thereto
138 or the performance of the duty is refused, then such conduct is not the exercise of a discretionary power but is a refusal to exercise it, and it is the power and duty of the Court to render nugatory such decision of the Commission and to command the performance of its duty.

Fifteenth. Plaintiff excepts to the third conclusion of law in the said report, on page 18 thereof, on the following grounds:

(*a*) The said conclusion does not correctly state the law.

(*b*) The said conclusion is couched in words of ambiguous and equivocal meaning.

(*c*) The said ambiguous and equivocal words employed in the said conclusion are applied in improper and fanciful senses to the facts of this case by the Master throughout the report, to the prejudice of the complainant in the correct determination of the issues in this cause.

Sixteenth. Plaintiff excepts to the fourth conclusion of law in the said report, on page 19 thereof, on the following grounds:

(*a*) The said conclusion does not correctly state the law.

(*b*) The said conclusion is couched in words of ambiguous and equivocal meaning.

(*c*) Without limiting the breadth of the grounds of exception given in the preceding two paragraphs, the said conclusion is erroneous particularly in stating that the courts do not possess the power to determine what is fair and reasonable under the circumstances of particular cases, whereas, on the contrary, the courts do possess the power which the Master therein erroneously concludes is denied to them.

Seventeenth. Plaintiff excepts to the fifth conclusion of law in the said report, on page 19 thereof, on the following grounds:

(*a*) The said conclusion does not correctly state the law.

(*b*) Without limiting the breadth of the ground of exception given in the preceding paragraph, the said conclusion is particularly erroneous in stating that the mere fact that a person or corporation engaged in public service is unable to earn a fair return is not conclusive that the rate prescribed is unjust or unreasonable in the constitutional sense, whereas, on the contrary, the true and correct proposition of law is that such fact is conclusive in many cases, and, particularly in this case, is conclusive that the rate prescribed is unjust and unreasonable in the constitutional sense.

Eighteenth. Plaintiff excepts to the sixth conclusion of law in the said report, on page 19 thereof, on the following grounds:

139 (*a*) The said conclusion does not correctly state the law.

(*b*) The said conclusion is couched in words of ambiguous equivocal meaning.

(*c*) Without limiting the breadth of the grounds of exception given in the preceding two paragraphs, the said conclusion is erroneous in stating "that there is no public guarantee." Ordinarily this phrase is unobjectionable, but due to the improper and fanciful meaning given to the word "guarantee" by the Master throughout

the report, and assuming that the word is used in the same improper and fanciful sense in the said *said* phrase quoted above, the said phrase does not correctly state the law.

(*d*) Without limiting the breadth of the grounds of exception given in the preceding three paragraphs, the said conclusion is erroneous in stating that if the public Service Company "is unable to earn a fair return when that is due not to the rate itself but to conditions over which the Legislature or Commission has no control, the courts cannot interfere." Ordinarily this phrase would not be objectionable, but in view of the improper and fanciful meaning given to it by the Special Master throughout his report, and adopting the same improper and fanciful meaning as it stands in this conclusion, the said sentence quoted does not correctly state the law.

(*e*) Without limiting the breadth of the grounds of exception given in the preceding four paragraphs, the said conclusion is also erroneous in stating that "the Constitution contains no guarantee against losses due to competition or adverse conditions of market with respect to the cost of labor, material or supplies." Ordinarily this sentence would not be objectionable, but in view of the improper and fanciful meaning given to it by the Master throughout his report, and especially in view of the incorrect, improper and fanciful meaning given to the word "guarantee" throughout the report, and adopting the same improper and fanciful meaning as it stands in this conclusion, the said sentence quoted does not correctly state the law.

Nineteenth. Plaintiff excepts to the seventh conclusion of law in the said report, on page 19 thereof, on the following grounds:

(*a*) The said conclusion does not correctly state the law.

(*b*) Without limiting the breadth of the ground of exception given in the preceding paragraph, the said conclusion is ambiguous and equivocal in that it does not state what is meant by "definite affirmative action by the Legislature and Commission." By adopting in the said conclusion, however, the meaning given to the said phrase by the context and grounds of argument of the report, the said conclusion does not correctly state the law.

(*c*) In addition to the above grounds of exception, the said conclusion is erroneous in assuming and stating that affirmative action by the commission is a condition precedent to the jurisdiction of the Court to exercise its power, whereas, on the contrary, the true and correct principle of law is that, where a city commission is endowed with the exclusive power to regulate rates, the law imposes upon such commission the duty, upon being shown that the rate enforced by them is unreasonable and confiscatory, to raise the prescribed rate to such a point as will not be unreasonable and confiscatory;
140 and when the law imposes upon a discretionary body the duty to do a particular thing upon determining that certain facts exist, and when a reasonable inquiry shows that there is no reasonable ground for any conclusion other than that the conditions

precedent to the performance of the duty exist, but the decision of the body is made contrary thereto or the performance of the duty is refused, then such conduct is not the exercise of a discretionary power but is a refusal to exercise it, and it is the power and the duty of the Court to render nugatory such decision of the Commission and to command the performance of its duty.

(*d*) In addition to the above grounds of exception, the said conclusion is inconsistent with and is contrary to other findings and conclusions of the Master in the said report, and particularly is inconsistent with and contrary to the statement in the said report, on page 26 thereof, that "the conclusive presumption is that they (the commission) will accord their action to the mandate of the law, and increase the rate whenever it becomes inadequate."

Twentieth. Plaintiff excepts to that portion of the said report wherein the Master discussed the facts and authorities from which he draws the erroneous conclusion of law that the enforcement of a rate reasonable when enacted can never be enjoined, which said portion of said report, for want of a caption therein given, may be identified as being that portion extending from the dotted line on page 19 to the dotted line at the bottom of page 31. Plaintiff excepts to the said portion of the report on the grounds that the facts as therein assumed are unsupported by and contrary to the evidence of record in the cause; that the conclusions of law stated therein are erroneous and incorrect.

Without limiting the breadth of the grounds of exception given in the preceding sentence, plaintiff urges in exception to the said portion of the said report the following additional grounds:

(*a*) The statement in the said portion of the said report that the rate prescribed was sufficient to enable the Company, up to and including 1912, to earn an average dividend of 8.83% (report p. 20) is erroneous for the reasons given in the fifth exception herein.

(*b*) The statement in the said portion of the said report that the earnings for the years 1903 and 1904 were 4.03% and 5.14% (report, p. 20) is erroneous for the reasons given in the fifth exception herein.

(*c*) The statement and conclusion in the said portion of the said report that the years 1903 and 1904 were not normal years
141 and that to determine upon a just basis of the rate of return under normal conditions those years should be excluded (Report p. 20) is erroneous and does not correctly state the law, but, on the contrary, the Master should have stated and concluded that the just basis of the rate of return is determined by average conditions, which include all years, good and bad.

(*d*) The statement in the said portion of the said report that, excluding the years 1903 and 1904, the operations for the remaining years resulted in dividends of 9.97% (report p. 20) is erroneous for the reasons (1) that it was improper to exclude the two said years,

(2) the percentages from which it is computed are incorrect for the reasons given in the fifth exception herein.

(*e*) The statement in the said portion of the said report that the operating revenues for the years 1913, 1914 and 1915 aggregated $144,776.10 (report p. 20) is erroneous for the reasons given in the Sixth exception herein.

(*f*) The statement in the said portion of the said report that, but for the conditions of competition and the necessity of reconstructing its tracks and paving, the total revenue for the years 1913, 1914 and 1915 would have been $664,277.29 (report, p. 20) is, in addition to the reasons given in the preceding paragraph, erroneous for the reason that the conditions of competition and of reconstruction of tracks and paving were improperly considered in arriving at the said sum.

(*g*) The said statement in the said portion of the said report that the average investment for the years 1913, 1914 and 1915 was $3,374,406.02 (report p. 20) is erroneous for the reasons given in the Sixth and Ninth exceptions herein.

(*h*) The statement in the portion of the said report that "the average annual operating revenue would have been $214,759.06" (report p. 20) is erroneous for the reasons given in paragraph (*f*), supra.

(*i*) The statement in the said portion of the said report that "the result in the end would have been, but for these conditions, an earning of 6.3% on the investment" (report, p. 20) is erroneous for the reason that all the sums from which it is computed are incorrect as already set out in the various paragraphs of this exception, and in the various exceptions herein.

(*j*) The statement in the first paragraph on page 21 in the said portion of the said report that, but for the losses on the out-city lines and the losses due to competition, the return would have been 6.7% for the year 1916 is erroneous for the reason that the supposed losses on the out-city lines and those due to competition are improperly excluded, and for the reasons that all the figures from which said percentage was computed, as given in the said paragraph, are incorrect for the reasons given in exceptions herein to the findings in the said report where the said figures are found by the Master.

(*k*) The statement in the second paragraph on page 21 in the said portion of the said report that but for the losses on out-city lines and from competition there would have been an earning of 8% for the year 1917 is erroneous for the reason that the supposed losses on out-city lines and from competition are improperly excluded and for the reasons that all the figures from which said percentage was computed, as given in the said paragraph, are incorrect for the reasons given in exceptions herein to the findings in the said report where the said figures are found by the Master.

(*l*) The statement in the third paragraph on page 21 in
142 the said portion of the said report that the result of operations in 1918 would have been a return of 7% is erroneous for the reasons that the supposed losses from competition and from out-city lines are improperly excluded therefrom, that the value of superseded and abandoned property is improperly deducted and for the reasons that all the figures from which said percentage was computed, as given in the said paragraph, are incorrect for the reasons given in exceptions herein to the findings in the said report where the said figures are found by the Master.

(*m*) The statement in the fourth paragraph on page 21 in the said portion in the said report that the result of operations for the year 1919, after disallowing as an operating expense the reconstruction reserve, will be not exceeding $134,949.19 is erroneous for the reason that the reconstruction reserve was improperly disallowed as an operating expense, and for the reason that no consideration was taken of the fact that the gross income for the year 1919 will be smaller than that for the year 1918, and for the reasons that all the figures from which said percentage was computed, as given in the said paragraph, are incorrect for the reasons given in exceptions herein to the findings in the said report where the said figures are found by the Master. On the contrary, the fact, is, and the Master should have so stated, that the result of operations for the year 1919 will be a deficit.

(*n*) The statement in the fifth paragraph on page 21 in the said portion of the said report that "the decrease in operating revenue in 1919 below that of 1918 is due, in addition to the causes I have mentioned, to an increase in the cost of materials and supplies" is erroneous for the reason that the said decrease in operating revenue is, in addition to the causes given by the Master, due to the fact that the gross income for the year 1919 will be less than that for the year 1918.

(*o*) The statement in the first paragraph on page 22 in the said portion of the said report that the city has not attempted in the last twenty years to reduce the rate and has affected it only to the extent of requiring the company to carry policemen and firemen without charge, is incorrect and contrary to the evidence in this cause because the evidence shows that the city has during the said period affected the said rate (1) by the ordinance requiring children under five years to be carried free and children under twelve and school children under seventeen years to be carried for 2½ cents, (2) by the ordinance of March 28, 1918, heretofore referred to, and (3) by the ordinance of October 3, 1918, heretofore referred to, fixing severe penalties and the forfeiture of plaintiff's franchise in case of violation thereof.

(*p*) The statement in the said portion of the said report that "to hold that the Court can grant relief by injunction in such a case is tantamount to saying that it can guarantee to the company a fair

return" (report, p. 22) does not correctly state the law, is an incorrect and fallacious conclusion, and gives to the word "guarantee" a wholly improper and erroneous meaning.

(q) The statement in the said portion of the said report that the revenues of this company for the year 1919 will be little more than sufficient to meet its operating expenses and pay interest on its bonds, and may be insufficient for those purposes, (report, p. 23) is erroneous. On the contrary the fact is, and the Master should have so stated, that there will be no revenue nor return whatever for the year 1919.

143 (r) The statements in the said portion of the said report that the complainant enjoys what has in the past been, for all practical purposes, a monopoly of the use of the streets of the City (report, p. 24) is unsupported by and contrary to the evidence of record in this cause, and is contrary to the Master's own findings that the plaintiff has lost money to competitors operating upon the streets of the City.

(s) The conclusion in the said portion of the said report "that to admit the contention of the company would be for the Court to exercise a power it does not possess; and to hold that the public must underwrite the adverse conditions shown here to exist" (report, pp. 24 and 25) is an incorrect statement of the law, is an incorrect and fallacious conclusion, and is contrary to the Court's opinion already rendered in reference to the jurisdiction of the Court.

(t) The conclusion in the said portion of the said report that "a rate, reasonable when fixed, does not become unreasonable, from the judicial point of view, because of changed condition" is an incorrect statement of the law, is an incorrect and fallacious conclusion, and is contrary to the opinion already rendered by the Court in reference to its jurisdiction.

(u) The statement in the said portion of the said report that justice to the company "does not require that the consequences of adversities should be shouldered upon the public" is an implied slur upon the intentions of the company wholly unwarranted by any evidence in this cause, for the fact is, and the Master should have so found and stated, that the company does not seek to shoulder the consequences of adversities upon the public, but seeks only a fair return upon the value of its property devoted to the public use.

(v) The conclusion in said portion of the said report that "the court cannot prescribe a guarantee against competition or any other of the conditions contributing to the embarrassment of the company" (report, p. 25) though ordina-ily not objectionable, is, due to the fanciful and erroneous meaning given throughout the report to the word "guarantee," and adopting the same meaning here, an improper and incorrect statement of the law.

Twenty-first. Plaintiff excepts to the statement in the said report, on pages 35 and 36 thereof, under the title "Basis of Valuation,"

that "the parties have presented, for my consideration in connection with oral testimony, the following: (3) cost of reproduction, less depreciation, on the basis of average values for three years from 1915 to 1917 inclusive", on the ground that the said statement is incorrect and erroneous. The truth is, and the Master should have so found and stated, that the cost of reproduction on the basis of average values for three years from 1915 to 1917, inclusive, was not presented for the Master's consideration as a basis of valuation of plaintiff's property, but, on the contrary, it was introduced in evi-
dence only as part of the computations by which the cost of
144 reproduction was arrived at on the basis of average values for the five years from 1915 to 1919, inclusive. No testimony on the cost of reproduction on the basis of average values for the three years from 1915 to 1917 was presented by defendants; and the plaintiff plainly showed to the Master, and particularly on page 612 of the stenographic report of the evidence made its position clear that it did not offer evidence of the cost of reproduction on the basis of average values for the three years from 1915 to 1917 as a basis of valuation of the plaintiff's property. Particularly, and in addition to the above grounds of exception the said statement is erroneous, incorrect and misleading in stating that the parties presented the said cost of reproduction "less depreciation." The record clearly shows that the defendants applied depreciation only to the five year summary, and that plaintiff applied depreciation only to the five year and to the 1919 basis of valuation. The said statement is erroneous, misleading, and unwarranted by the evidence of record in the cause.

Twenty-second. Plaintiff excepts to the portion of the report on page 48 with reference to the "losses from jitney competition", and to the statement of the Master that these losses were due, not to the ordinance, but to conditions over which the defendants had no control and says that same is an incorrect statement of the fact and of the law, because, under the law, the defendant City did have control of jitney competition, and could have prevented the same if it had seen fit to do so.

Twenty-third. Plaintiff excepts to the finding of the Master on page 48 or the report that the sum of $363,701.19, found as losses during construction for the years 1913 to 1915, should be added to the revenue in determining whether the ordinance rate is confiscatory, because the same is an incorrect conclusion of law, and it is entirely erroneous to add such losses to the revenue, and particularly losses of this character that were directly caused by the municipal requirements of the defendant, City of San Antonio.

Twenty-fourth. Plaintiff excepts to the first finding on page 49, at
the bottom of the page, marked (1), because same is un-
145 warranted by the evidence, and is directly contrary to the evidence in the case, and directly contrary to the Master's own finding, because he applies a depreciation on the property of 15.27%, and in the face of such application by him and such finding that the property had depreciated 15.27% makes this finding that all

necessary reconstruction and replacements had been taken care of out of operating expenses.

Twenty-fifth. Plaintiff excepts to the second finding on page 49 of the report, because same is unsupported by the evidence, and because it is inconsistent with the Master's other finding herein, wherein he has excluded said amount from the capital invested, and the result of these two findings is to exclude said amount from said invested capital, and also to deny the company the right to set up a reserve therefor.

Twenty-sixth. Plaintiff excepts to the third finding on page 50 of the report, because:

(a) It is erroneous in holding that plaintiff is not entitled to set up a reconstruction reserve for said amount, and is inconsistent with his finding that said sum should be excluded from the capital invested;

(b) Because the undisputed evidence shows that ever since July 1, 1917, the plaintiff has set up a reconstruction reserve account, and has not charged superseded cars to the capital account.

Twenty-seventh. Plaintiff excepts to the fourth finding on page 50 of the report, because:

(a) The Master recommends in this report that no reconstruction reserve should be allowed to be set up by plaintiff, and that same should be disallowed as an operating expense, but, nevertheless, holds that depreciation should be applied, which is clearly inconsistent and unjust, because if depreciation is to be applied for values fixed on a reconstruction basis, then, clearly under the law, plaintiff should be allowed to set up a reconstruction reserve to take care of such depreciation; and,

(b) If the valuation is fixed on the cost basis, then depreciation should not be applied, because the undisputed evidence in this case shows that the plaintiff has not been able to earn a sufficient amount to pay a reasonable dividend and set aside the necessary fund to provide against depreciation.

(c) The Master therein purports to compute annual depreciation by dividing the present depreciation of the property by the number of years the plant has been in existence, and erroneously states as the result of such computation that the depreciation has been "less than 1% annually", whereas such method of computation is entirely improper and false because (1) it does not take into account the fact that only a very small part of the present property of plaintiff has been in existence for the length of time assumed, (2) it is not
146 based on the length of time which the several components of plaintiff's property have been in existence respectively, (3) it does not take into account the fact that parts of the street railway system have been used up and replaced, some of them many times, since the origin of the said system in this city, and (4) it does not

take into account the property superseded by the requirements of the city.

Twenty-eighth. Plaintiff excepts to the finding and recommendation of the Master that the depreciation or reconstruction reserve should be disallowed, because:

(*a*) Under the law a public utility company is entitled, and it is its duty, to set aside annually a reserve fund to provide against depreciation.

(*b*) The undisputed evidence shows that the plaintiff was entitled to, and should set aside a reconstruction reserve to cover deferred maintenance, and the defendant City's experts testified that 20% of the gross receipts should be set aside to cover maintenance and reconstruction reserve, and the city's own witnesses and the Master's findings show that for the year 1917 the total amount expended by the plaintiff for maintenance, plus the amount set aside for reconstruction reserve, aggregated less than 20% of the gross receipts; and for the year 1918 the said two amounts aggregated only 19.04% of the said gross receipts (Record, page 828); And under the undisputed evidence in the case the amount set aside is shown to be reasonable and proper, and the Master's recommendation that it be disregarded is arbitrary, and without warrant under the law or the evidence, and contrary to all the evidence offered by the plaintiff and the defendants.

Twenty-ninth. Plaintiff excepts to the Master's report in fixing the valuation of plaintiff's property at $4,535,880.00, because the reasoning throughout the said report shows that in arriving at the valuation the Master has really been controlled by the question of actual cost of the properties, and if actual cost is to be taken, then he has erred in excluding the item of $533,980.00 expended for superseded track, because the undisputed evidence shows that this track was good for the use of plaintiff, and was superseded, not because it was necessary for it to render service, but by reason of municipal requirements of the defendant City, and the $89,724.02 excluded for superseded equipment is erroneous, because said equipment was superseded because of obsolescence, and therefore neither of these items should have been excluded from the value. Said holdings are particularly inconsistent with the holding of the Master that the plaintiff is not entitled to set up a reconstruction or depreciation reserve fund to meet either of said items.

147 Thirtieth. Plaintiff excepts to the report, in that the Master excludes the item of "working capital" from the valuation of plaintiff's property throughout the said report, because:

(*a*) Same is an incorrect conclusion of law, and the finding that a street car company does not need working capital because it collects its charges in advance, is erroneous in that such a company must have working capital and be equipped to receive such passengers before it offers to do business, and cannot wait, after pas-

sengers pay their fares, to establish its business before carrying them.

(*b*) The statement in the second paragraph on page 38 of the report, that the interest on bills is probably charged to operating expense, is entirely erroneous, and is not a fact, and there is no evidence to support it, and the statement that such a charge would be a double charge against the traffic is erroneous and is contrary to the facts, and the fact is that interest on bills payable is not charged by plaintiff company to operating expenses.

Thirty-first. Plaintiff excepts to said report because the master fails to affirmatively find that plaintiff applied to the defendants, Mayor and Commissioners of the City of San Antonio, for permission to raise its rate of fare, and that said application was by said body denied, as shown by the ordinance, a copy of which is attached to plaintiff's bill and marked "Exhibit B," and to further find that plaintiff's motion for a rehearing on said application was also denied by said body.

Thirty-second. Plaintiff excepts to the report in that throughout the said report the Master excludes, not only in reference to valuation but also in reference to operating expenses and revenue, consideration of the plaintiff's lines of railway extending beyond the political boundaries of the city. In so doing, the Master's findings, conclusions and recommendations are incorrect and erroneous, because:

(*a*) The undisputed evidence in the cause shows that all the territory served by the plaintiff's lines of railway, both inside and outside the political boundaries of the city, with the possible exception of the South San Antonio line on which an extra fare is charged, is part of the business and residential community of San Antonio, is inhabited and built up contiguously to the city, is suburban to the city as distinguished from interurban, and is in all respects part of the one and single urban community of San Antonio.

(*b*) The undisputed evidence in the cause shows that none of plaintiff's lines of railway, with the exception of the South San Antonio line on which an extra fare is charged, extends for
148 a greater distance from the center of the city than the distance from the center to any corner of the city, and, since the city ordinance impose- a five-cent fare within the city limits, it would be an illegal and unlawful discrimination on the part of plaintiff to attempt to charge a greater fare on any of its lines except the South San Antonio line.

(*c*) The action of the City Council does not change the common and statutory law of the State against discrimination, and, by virtue of such law, any rate prescribed and enforced by the City Council within the political limits of the city is thereby required to be charged on all the lines of the plaintiff, whether within or without the political limits of the city, under the facts of this case, except the South San Antonio line. Such being the effect of a rate en-

fered by the city, it follows that to determine the reasonableness of the said rate it is necessary to take into consideration the entire system of plaintiff over which, by operation of law, the rate is effective.

Plaintiff prays that the foregoing exceptions be sustained, and that the relief prayed for in its bill and amendment thereto be granted.

Respectfully submitted:

TEMPLETON, BROOKS, NAPIER & OGDEN,
HOWARD TEMPLETON,
S. J. BROOKS,
WALTER P. NAPIER,
LEO BREWER,

Solicitors for Plaintiff,
San Antonio Public Service Co.

We hereby acknowledge receipt of a copy of the foregoing exceptions and waive notice of the filing of same.

_____,
Solicitors for Defendants.

Endorsement: No. 214. In Equity. In the United States District Court for the Western District of Texas, San Antonio Division. San Antonio Public Service Co. vs. City of San Antonio et al. Plaintiff's Exceptions to the Report of the Special Master. Filed September 15th, 1919, at 3:30 P. M. D. H. Hart, Clerk. By A. I. Campbell, Deputy.

149 The United States District Court, Western District of Texas, San Antonio Division.

No. 214. *Equity.*

SAN ANTONIO PUBLIC SERVICE COMPANY

vs.

CITY OF SAN ANTONIO et al.

Opinion.

On Exceptions to Master's Report.

The Defendant City's demurrer, and plea to the jurisdiction, to the original bill rested upon the contention that the relation between the parties was one of contract, and measured by the letter of the law. The Court held that the relation was not one of contract, but of governmental regulation, and that a case invoking the equitable powers of the Court had been stated in the bill. Reference to a Master followed, with direction to consider the issues arising under the bill, to take testimony, and to make report of his conclusions of

law and fact. Mr. Frank H. Booth, the Master appointed, has diligently and with ability performed his duties, taking some 919 pages of oral testimony and approximately 800 pages of exhibits, which cover a research of highly technical and detailed questions of accounting in arriving at a fair valuation of the property in issue, and of many co-related questions.

The Master, after finding the existence of certain facts, concludes as a matter of law that the Court is without power or jurisdiction to grant the relief prayed for, and, therefore, recommends that the bill be dismissed.

The City makes no objections to the Master's report, thereby confirming and approving it.

The Company filed 32 exceptions which challenge the correctness of the report in every particular.

150 The purpose of this hearing is to consider only such exceptions as bear upon the Master's recommendation to dismiss the bill since the jurisdiction and power of the Court must first be determined. The recommendation is based upon the following conclusions: (1) That the City's ordinances prescribing the rates, and refusing to increase the rates, is an exercise of legislative power and discretion; (2) That the rate was reasonable when made and so conceded by the Company; (3) That the changed conditions bringing about the decrease in revenues are as follows,—abnormal expenditures made by the Company for street paving, jitney competition, and advances in cost of labor and prices of material and supplies; (4) Though empowered to consider changed conditions the City's failure and refusal to exercise its discretion when requested by the Company so to do, being a legislative act, could not be inquired into or interfered with by the judicial branch,—consequently the Court is without jurisdiction to interfere by injunction or otherwise; (5) That the net operating revenues for the six years preceding 1919 show an average return of 2.39 per cent upon the Master's valuation; and returns for 1919 and probably for several years following will not represent a fair return upon the value of the property.

The City, in making and in refusing to raise the rate, was exercising a legislative function. This fact, of itself, constitutes no bar to judicial inquiry. In a case involving the validity of an order fixing maximum rates to be charged by a public utility company, the Supreme Court of the United States declares (Knoxville vs. Water Co. 212 U. S., p. 8), that—

"The function of rate making is purely legislative in its character, and this is true whether it is exercised directly by the legislature, itself, or by some subordinate or administrative body to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power. Prentis vs. Southern Railway Co., 211 U. S., 210; Honolulu Transit Co. vs. Hawaii, 211 U. S.,

151 282. There can be at this day no doubt, on the one hand, that the Courts on constitutional grounds may exercise the power of refusing to enforce legislation, nor, on the other hand, that that power ought to be exercised only in the clearest cases. The

constitutional invalidity should be manifest, and where that invalidity rests upon disputed questions of fact the invalidating facts must be proved to the satisfaction of the Court."

The Court confirms the Master's statement of the law, as follows:

"The Supreme Court has been emphatic that there can be no judicial interference with the action of the legislative department in prescribing rates, except in the clearest case of invasion of private rights and to the extent of confiscation."

Railroad Commission Cases, 116 U. S., 307, 331.
Dow vs. Beidelman, 125 U. S., 680, 689.
Chicago & G. T. Ry. vs. Wellman, 143 U. S., 339, 344.
Reagan vs. Farmers' Loan & Tr. Co., 154 U. S., 362, 397.
St. Louis & S. F. R. R. vs. Gill, 156 U. S., 649, 657.
Covington, etc., Turnpike Co. vs. Sanford, 164 U. S., 578, 594.
Smyth vs. Ames, 169 U. S., 466.
San Diego Land Co. vs. National City, 174 U. S., 739.
Willcox vs. Consolidated Gas. Co., 212 U. S., 19, 41.

Does the existing rates afford a fair return upon the value of the Company's property? If so, the bill should be dismissed. Do the returns fall so short of a reasonable standard as to result in a taking of the Company's property without due process of law, or a denial of equal protection of the law within the meaning of Article 14 of the Constitution of the United States, and as inhibited by Article 5 of the Constitution providing that private property shall not be taken for public use, without just compensation? If so, the bill must stand. The answer must be found in the volumes of testimony taken before the Master. Upon the question whether the bill should or should not be dismissed it will be assumed that the findings of fact, mentioned herein as forming a basis upon which the Master recommends that the bill be dismissed, are true. No objection or exception is taken by either party to the Master's general findings on pages 12 and 23 of his report, as follows:

"The fact that the Company will not, during the year 1919, and probably for several years, earn a reasonable return upon the
152 value of its property is so apparent from the record that it will not be disputed by the defendants. The immediate cause of this condition is, speaking generally, the increased cost of labor, material and supplies, and jitney competition."
(Master's report, p. 12.)

and

"The revenues of this Company for the year 1919 will little more than be sufficient to meet its operating expenses and pay interest on its bonds, (and the property is bonded for less than one half of its real value) and may be insufficient for those purposes."
(Master's Report, p. 23.)

The Master makes the following other findings, to which exceptions were taken:

"that since 1912 the operating revenues have been as follows: 1913, 2.10%; 1914, 2.22% 1915, .25%; 1916, 1.59%; 1917, 3.82%; 1918, 4.36%;—and that the operating revenues for 1919 will not exceed 3.88% on the value of the property situated within the city limits, after deducting the losses incurred in operating the outside lines."

(Master's Report, p. 10.)

and

"that eight per cent on capital invested in plaintiff's business is a reasonable return."

(Master's Report, p. 11.)

These findings are, in effect, a general finding that the property is being operated on a basis of return that is confiscatory, unless the changed conditions bringing about the decrease in revenue, as contended by the Master, should be excluded because considered as abnormal conditions and expenditures covered by the risks assumed.

The contentions maintained, (1) that a rate reasonable when fixed does not become unreasonable because of changed conditions, where the rate is fixed by regulatory ordinance, even though it has been rendered confiscatory; (2) that if the inability to earn a fair return be due to subsequently occurring circumstances over which the rate making body had no control, the Courts cannot interfere, and (3) to grant relief by injunction, in the case presented, would be to guarantee to the Company a fair return,—are not supported by direct authority.

153 The administration of justice by the law is too rigid, and equity, following the law, lacks the breadth and elasticity to meet constantly changing conditions; therefore, the regulation of rates to be charged by public service companies has been placed either with quasi judicial commissions, or is fixed by contract between the parties. The principles governing the making of rates are simple. The public is entitled to the highest standard of service, having due regard to safety, comfort, economy and efficiency, and at a fair and reasonable charge. The Public Service Company must furnish the character of service mentioned at a charge that will enable it to perform its duties to the public, maintain its property, and, at the same time, afford it a fair return upon the value of its property. Stated in another form, where the rates are declared by the rate making authority as regulatory, the duties rest upon that body to see that the public is protected against an excessive charge, and, on the other hand, that the Company is protected against an unfair return upon its outlay. The rate commission in maintaining a delicate and even balance between these two poles of essential right has a great responsibility, and a most difficult undertaking. The range of inquiry between excessive charge, on the one side, and fair return on the other, is a "no man's land." Who so ventures there to adjust these delicate balances, whether Commission or Court, invariably returns bearing the scars of criticism, and seldom the need of praise.

It results from the foregoing remarks that the Articles of the Constitution, referred to, afford full and ample protection, both to the City of San Antonio and the Public Service Company complainant herein. A decree will be prepared enjoining the defendants from carrying into effect or operation the ordinance, named in the bill, which prevents or interferes with that portion of the complainant's prayer, in the petition, asking that it be permitted to raise the rate of fare to be charged for the carrying and transfer of passengers. The Court, not being a rate making body, can
154 fix no rate of fare which should be charged in the future. It may be possible that the parties, upon conference, may agree upon some plan that will reach the desired results. It may be that further action of the Court in the interest of both, or either, parties might be required. Perhaps the decree should not be final in its character.

Awaiting further advice in the premises, the order may be limited to the injunction referred to with leave to both parties to take such action, by amendment or otherwise, as they may be advised, until a form of final decree may be determined.

DUVAL WEST,
Judge.

San Antonio, Texas, November 3, 1919.

Endorsed: United States District Court. Western District of Texas, San Antonio Division. San Antonio Public Service Co. vs. City of San Antonio et al. No. 214, Equity. Opinion on Exceptions to Master's Report. Filed Nov. 3rd, 1919. D. H. Hart, Clerk, By A. I. Campbell, Deputy.

155 In the United States District Court for the Western District of Texas, San Antonio Division.

No. 214. In Equity.

SAN ANTONIO PUBLIC SERVICE COMPANY

vs.

CITY OF SAN ANTONIO et al.

On this the 3rd day of November, A. D. 1919, came on to be heard the exceptions of the plaintiff, the San Antonio Public Service Company to the report of the Special Master filed herein on the 27th day of August, 1919, said exceptions having been filed on the 15th day of September, 1919, insofar as they related to the recommendation by the Master that the plaintiff's bill filed herein be dismissed and the court having heard and duly considered same is of the opinion that plaintiff's first exception and each subdivision thereof and the 2nd, 3rd, and 4th exceptions should be sustained and that all those portions of the Master's report recommending that the bill should be dismissed for want of jurisdiction should be disapproved and denied. And the court having examined the other exceptions filed herein by plaintiff is of the opinion that, in view of the fact that, even under the valuation found by the

Master and the return under the operating expenses as found by him, the Company is not earning a fair return, it is not necessary for the court to pass on the questions raised by plaintiff's exceptions as to its right to a higher valuation allowance of reconstruction reserve, outside city lines or by any of the other exceptions filed herein by plaintiff except the ones above passed on and accordingly the court declined to do so, but the failure of the court to pass on same shall not be considered as overruling the other said exceptions or finding that they are without merit, and the court simply confirms the report of the Master in so far as it recommends that the injunction prayed for be granted, if the bill be not dismissed for want of jurisdiction, with the reservation suggested, and the valuation and operating expenses as found by him insofar as they are necessary to support said judgment without passing on the questions as to whether the plaintiff is entitled to a higher valuation
156 or the allowance of a reconstruction reserve or the other questions raised by its exceptions.

It is therefore ordered, adjudged and decreed by the court that the plaintiff's 1st, 2nd, 3rd and 4th special exceptions to the Master's report be sustained and the recommendation that the bill be dismissed for want of prosecution be denied, and the report in that respect disapproved to which ruling and the ruling of the court in approving the portion of the report recommending the granting of an injunction herein, the defendants in open court duly excepted and the plaintiff in open court excepted to the refusal of the court to pass on the other exceptions filed herein to the Master's report.

DUVAL WEST,
Judge.

Endorsed: No. 214. in Equity. San Antonio Public Service Co. vs. City of San Antonio, et al. Order on Plaintiff's Exceptions to the Special Master's Report. Filed November 26th, 1919. D. H. Hart, Clerk, By A. I. Campbell, Deputy.

157 In the United States District Court for the Western District of Texas, San Antonio Division.

No. 214. In Equity.

SAN ANTONIO PUBLIC SERVICE COMPANY

vs.

CITY OF SAN ANTONIO et al.

On this the 26th day of November, 1919, this cause came on to be further heard at this term, and was argued by counsel, and thereupon upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

That the prayer of plaintiff The San Antonio Public Service Company for an injunction herein be granted and that the defendants, the City of San Antonio, and Sam C. Bell, Mayor, Ray Lambert, Louis Heuermann, Andres Coy and Phil Wright, City Commissioners,

and R. J. McMillan, City Attorney of said City of San Antonio, and each of them and their successors in office be and are hereby restrained and enjoined from enforcing the ordinance of the City of San Antonio of date March 28th, 1918, referred to in plaintiff's petition and attached as exhibit "A", which prohibits plaintiff from changing its rate of fare without the consent of the Mayor and Commissioners of the City of San Antonio and the penalties therein provided for, (it appearing that plaintiff had applied to the Mayor and Commissioners for such consent and same was denied) Sections 2, 3 and 4 of the ordinance of the City of San Antonio of date October 3, 1918, a copy of which is attached as Exhibit "B" to plaintiff's petition, which prohibits plaintiff from charging more than five cents for one continuous ride over any one of their lines, with one transfer to or from either line to the other within the corporate limits of the City of San Antonio and provides penalties for the violation thereof; that portion of the ordinance of the City of San Antonio of date March 16, 1899, set out in plaintiff's petition as follows, "That said street railway companies shall charge five cents fare for one continuous ride over any one of their lines with one transfer to or from either line to the other;" Sections 20 and 64 of chapter 47 of the Revised Criminal Ordinances of the City of San Antonio, which prohibit street railway companies from charging more
158 than five cents fare with transfers and provide penalties for the violation thereof; and also the ordinance of date November 17, 1903, a copy of which is attached to plaintiff's petition as Exhibit "C", which limits rate of fare to be charged for children to two and one-half cents (this decree is not intended, however, to enjoin in any way the Half Fare Statute passed by the Legislature of the State of Texas and referred to in plaintiff's petition).

It is further ordered that the defendants and their successors in office shall have the right at any time to apply to the Court by bill or otherwise, as they may be advised, for a further order or decree whenever it shall appear by reason of change in circumstances or conditions that the rate of fare prescribed by the ordinances above referred to is sufficient to yield the Company a reasonable compensation for the services rendered.

It is further ordered and decreed that all costs incurred herein be taxed against the defendants.

To which ruling and judgment of the Court the defendants and each of them in open court duly excepted and gave notice of appeal.

DUVAL WEST,
Judge.

Endorsed: No. 214. In Equity. San Antonio Public Service Co. vs. City of San Antonio et al. Final Decree. Filed November 26th, 1919, at 3 o'clock p. m. D. H. Hart, Clerk, By A. I. Campbell, Deputy.

159 United States District Court, Western District of Texas, San Antonio Division.

No. 214. In Equity.

SAN ANTONIO PUBLIC SERVICE COMPANY

vs.

CITY OF SAN ANTONIO et al.

Statement of Evidence.

For the purpose of shortening the record the parties hereto, with the approval of the court, have agreed that the following statement constitutes the material evidence introduced before the Honorable Du Val West, United States District Judge for the Western District of Texas, on the plea to the jurisdiction and motion to dismiss this case, and before the Honorable Frank H. Booth, Special Master, upon reference.

Prior to March, 1899, the San Antonio Gas Company, the Mutual Electric Light Company, the San Antonio Street Railway Company and the San Antonio Edison Company were public utility companies, duly incorporated under the laws of the State of Texas and exercising the franchises granted to them by the City of San Antonio in and upon the streets, etc., of said city. The San Antonio Street Railway Company and the San Antonio Edison Company were incorporated for the purpose of constructing, owning and operating street railway systems in the City of San Antonio, and by virtue of franchises theretofore granted by said city were on March 16, 1899, and prior thereto operating lines of street railway on the streets of said city.

Upon the request of said companies and at the date last named, to-wit, March 16, 1899, the City Council of said city enacted an ordinance whereby it extended said rights and privileges and the franchises of said companies from 1924 to the first day of July, 1940. Said ordinance was captioned as follows: "An Ordinance Granting an Extension of Time and Fixing the Date at which the Rights, Privileges and Franchises of the San Antonio Gas Company, Mutual Electric Light Company, San Antonio Street Railway Company and the San Antonio Edison Company Shall Expire, and Imposing Conditions upon the Exercise of Said Rights, Privileges and Fran-

160 chises," and contained among other things the following two provisions: (1) "That said Street Railway Companies shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other;" (2) "Section 4. Said companies or either of them or their assigns shall file with the City Clerk on or before the first day of May, A. D. 1899, its or their written acceptance of the terms and conditions of this ordinance; otherwise this ordinance shall have no force or effect." A true copy of the said complete ordinance of March 16, 1899, is set out in Complainant's Original Bill of Complaint.

Each of said companies, acting through their duly accredited agents and officers, with authority from their board of Directors, duly filed with the City Clerk within the time limit fixed by the ordinance their written acceptance of the terms and conditions of same.

At the time of the passage of said ordinance and the acceptance of same by the said companies the charter of the City of San Antonio, granted to it by the Legislature of the State of Texas, then in force, contained the following provisions:

"Be it enacted by the Legislature of the State of Texas:

That all inhabitants of the City of San Antonio are hereby constituted a body corporate and politic, and shall have power:

* * * * * * *

Sec. 99. To direct and control the laying and construction of railroad tracks, turnouts and switches, or prohibit the same in the streets, avenues and alleys, and location of depot grounds within the city; to require that railroad tracks, turnouts and switches shall be so constructed as to interfere as little as possible with the ordinary travel and use of the streets, avenues and alleys, and that sufficient space shall be left on either side of said tracks for the safe and convenient passage of teams, carriages and other vehicles and persons; to require railroad companies to keep in repair the streets, avenues or alleys through which their track may run, and if ordered by the City Council to light the same and to construct and keep in repair suitable crossings at the intersections of streets, avenues and alleys, and ditches, sewers and culverts, when the city council shall deem necessary to direct the use and regulate the speed of locomotive engines within said city or prevent or prohibit the use or running of the same within the city.

Sec. 100. Exclusively to prevent, control and regulate everything connected with city railroads, and to make such rules and regulations for the same as the city council may deem necessary."

The Legislature of the State of Texas on April 10th, 1903, enacted what is known as the "Half Fare Law," requiring street railway companies in cities and towns of not less than forty thousand in-
161 habitants to carry children under twelve years of age for one-half the fare charged adults and to issue tickets in lots of twenty to school children under seventeen years of age for one-half the fare charged adults and to carry children under five years of age, attended by a passenger above that age, free of charge, and provided a penalty for violation thereof.

On November 17, 1903, the City of San Antonio enacted an ordinance requiring the street railway companies in said city to carry school children under the age of twelve (12) years for two and one-half cents ($2\frac{1}{2}$c) each and to sell tickets to students under seventeen years of age in the manner required by the said "Half-Fare" Law above referred to. Said ordinance provided for penalties, and a true

copy of same is set out in full as Exhibit C, Plaintiff's Bill of Complaint.

The City of San Antonio was at the time of the passage of said State "Half Fare" Law and is still a City of over forty thousand inhabitants and said Act applies to all street railways operating in said City. This Act of the Legislature was contested by the San Antonio Traction Company, which had succeeded to the rights of the San Antonio Edison Company and the San Antonio Street Railway Company on the ground that the provision in the franchise ordinance of March 16th, 1899, as to fares constituted a contract. The case in which this contest was made was that of George Altgelt vs. San Antonio Traction Company, filed in the District Court of Bexar County, Texas. Judgment was rendered against the Company in the District Court and an appeal was taken by it to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, where said judgment was affirmed in an opinion reported in 81 Southwestern Reporter, page 106, styled San Antonio Traction Company vs. Altgelt. A writ of error was taken to the Supreme Court of the United States, where the decision of the Texas courts was affirmed in the case of San Antonio Traction Company vs. Altgelt, 200 U. S. page 304, and ever since the date of the decision of the Supreme Court of the United States the San Antonio Traction Company and its successor, the San Antonio Public Service Company, have complied with the terms of said statute and said City Ordinance and carried the persons therein designated for two and one half cents (2½¢), and children under five years of age, attended by a passenger above that age, free.

The said State Half Fare Law has never been repealed or modified and is still in full force and effect, and the said City ordinance
162 has never been repealed or modified, unless the ordinance of October, 1918, set out as "Exhibit B" to plaintiff's Bill of Complaint, had the effect of modifying it.

On June 24th, 1907, the City of San Antonio enacted an ordinance requiring Street Railways in said City to transport and carry free of charge all persons serving in the Police and Fire Departments while on duty and in uniform, or provided with written authority by the City Marshal or the Chief of the Fire Department. Said ordinance provided for penalties. A true copy of same is attached to Plaintiff's Original Bill of Complaint and marked "Exhibit D."

The plaintiff and its predecessor, the San Antonio Traction Company, have both complied with said Ordinance since the passage thereof.

Prior to April 4, 1900, the San Antonio Traction Company was incorporated under the laws of the State of Texas, for the purpose of owning, constructing and operating a street railway system in San Antonio, and upon that date became the owner of all the rights, privileges and franchises of the San Antonio Street Railway Company and the San Antonio Edison Company, and thereafter, up to the time the San Antonio Public Service Company became the owner, owned and operated a street railway system in said City under and by virtue of said rights and franchises. On or about July 1, 1917, the plaintiff, the San Antonio Public Service Company, complainant in this case, was incorporated under the laws of the State of Texas.

During the month of July, 1917, the San Antonio Traction Company and the San Antonio Gas & Electric Company filed their petition with the City of San Antonio, praying that the city grant them the right to assign to the San Antonio Public Service Company all of the rights, privileges and franchises of any and every nature enjoyed by the Traction Company and the Electric Company. By ordinance of July 10, 1917, a true copy of which is attached to respondent's plea to the jurisdiction and motion to dismiss, marked "Exhibit A," the City of San Antonio granted said prayer, but provided by said ordinance evidencing said grant that all the limitations, duties, contracts, forfeitures and obligations imposed on or required of either of said companies at that time should be imposed on and required of plaintiff, and provided further that the ordinance should not take effect until plaintiff should accept all the provisions and limitations of the ordinance within ninety days after the final passage of same. The Complainant, the San Antonio Public
163 Service Company, duly accepted said ordinance upon the terms and subject to the limitations therein set out, and a true copy of such acceptance is attached to Respondent's Plea to Jurisdiction and Motion to Dismiss, and thereupon became and is still the owner of all the rights, privileges and franchises theretofore owned and enjoyed by said San Antonio Traction Company and said San Antonio Gas & Electric Company.

At that time the City Charter gave the Commissioners power under Section 95: "To exclusively control and regulate everything connected with street railways and to make such rules and regulations for the same as the Commissioners may deem necessary."

Prior to March 16, 1899, there was enacted a City Ordinance in effect requiring street railway companies within the City of San Antonio to transport passengers for a five cent fare with transfers to other lines of the same company, a true copy of this ordinance is attached to plaintiff's First Amendment to its Original Bill filed July 26, 1919, marked "Exhibit D." This ordinance has never been repealed and was in force on March 16, 1899, and also on July 1, 1917, and remained in force until October 3, 1918.

The San Antonio Traction Company was in July, 1917, transporting adult passengers within the city limits of the Ciy of San Antonio for a fare of five cents and giving universal transfer, and was carrying the persons designated in the State Half Fare Law for half fare and children under five years of age free when attended by a person above five years of age, all as required by aforesaid statute and ordinance, and no question was raised or complaint made with regard to this rate of fare by said Traction Company or the San Antonio Public Service Company at the time that the application was made for the right to consolidate the franchises of the Gas and Electric Company and the Traction Company by assigning same to the Public Service Company, or at the time said petition was granted or accepted.

Prior to the time when petition was made by the Gas and Electric Company and the Traction Company to transfer their franchises to the San Antonio Public Service Co., the City of San An-

tonio had amended its charter, to-wit, in 1914, as provided for
164 by what is commonly known as the Home Rule Amendment of the Constitution of the State of Texas, authorizing cities and towns over 5,000 people to adopt, alter or amend their own charter by public election, and this charter contained the same provisions with reference to the regulation and control of street railways as hereinbefore set out.

On March 28, 1918, the City of San Antonio passed an ordinance forbidding any public service company, enjoying any public franchise or privilege in the City of San Antonio, changing or raising its rates without first filing application with the Mayor and Commissioners and obtaining permission, and denouncing certain penalties for the violation of said ordinance; a true copy of said ordinance, marked "Exhibit A" is attached to Complainant's Bill of Complaint.

On August 29, 1918, Complainant, the San Antonio Public Service Company filed a petition with the City of San Antonio, alleging that the price of labor, materials and the burden of taxation had been greatly increased since the war and that by reason of the increased cost of maintenance and operation, the traction department of plaintiff could not earn enough to make the expenses of maintenance and operation and a reasonable return on its investment, and prayed that the rate of fare should be fixed by the City at present at six cents, with universal transfers inside the City limits, or that the rate of fare be fixed at five cents to and from the center of the city to any point on the car lines inside the city limits, and that transfers and cross-town routing on a five cent fare be eliminated. This petition was denied by the City by ordinance passed during the month of October, 1918, a true copy of which is attached to Complainant's Original Bill of Complaint, and marked "Exhibit B." After the denial of this petition motion for re-hearing was filed before the Mayor and Commissioners and this was also denied, and suit was then instituted in the present case. On said hearings before the city Commissioners, plaintiff introduced in effect the same evidence as was introduced in this trial and no evidence was offered by the City.

Complainant, the San Antonio Public Service Company, furnishes gas and electricity and street car service to the citizens of San Antonio and people residing in the suburbs adjacent to the City.

On the question as to what was a reasonable return on the value of Complainant's property devoted to the public use there was a conflict in the evidence, some witnesses testifying that seven per
165 cent was a fair return and some eight per cent and some ten per cent, or more. The Master found that eight per cent was a fair return.

A detailed statement of the result of operations for all of the years, beginning with 1902, in the Traction Department occurs on Page 51 of the Master's report.

There was no evidence introduced either pro or con with regard to the operating expenses and revenues of the gas and electric department, but as shown by Section 3 and 4 of the City Ordinance permitting the San Antonio Traction Company and the San Antonio Gas and Electric Company to transfer their franchises to the San

Antonio Public Service Company, said San Antonio Public Service Company is required to keep the books and accounts of the gas and electric departments separate from the transportation department and the right is especially reserved to the city in fixing the rates for gas and electricity, "to do so separately and independently of the matter of the earnings, or profits, or losses, or investments, of the Company in the transportation branch of its service, and in the same manner and to the same extent as if said branches of its service were still separate and distinct corporations."

From 1902 to 1912 inclusive complainant's predecessor, the San Antonio Traction Company earned an average dividend of 8.83% on invested capital. The losses for 1913 and 1914 were due largely to interruption of business by an unusually large amount of street paving the City was engaged in, and in 1915 largely to jitney competition. Since 1912 the operating revenues, owing to the advance in prices, jitney competition and the war, have decreased, and in the traction department have been as follows:

1913	2.02%
1914	2.22%
1915	.25%
1916	1.59%
1917	3.82%

For the years 1918 and 1919 the net operating revenue found by the Master on the reasonable value of the property as found by him within the city limits were 4.36% for the year 1918 and 3.88% for the year 1919. In arriving at this finding he excluded the value of the property outside of the city limits and the losses from the result of the operation of the lines outside of the city, which he found to be forty-six thousand dollars ($46,000.00) for each of said years. The evidence showed that the city limits were six miles square and the only portion of the plaintiff's lines operated outside of the city were certain lines extending to suburbs immediately adjoin-
163 ing the city and that these lines were very little, if any, longer than the distance from the center of the city to either corner of the city, except the line to South San Antonio, which runs about two miles from the city limits and an additional fare of five cents is charged on this line and the evidence does not show whether this particular line was operated at a loss or not.

In arriving at the net operating revenue for the years 1918 and 1919 the Master eliminated the item of $120,000.00 set aside as a reconstruction reserve for each of said years and included as an operating expense. If this item be allowed as an operating expense the rate of return for each of said years on the value of the property as found by the Master would be approximately 1.90% and 1.22% respectively.

The evidence further shows that if the entire traction system be considered together and if the value of the property be fixed on the basis of its present value or on the average value for three or five years, as shown by the evidence introduced by the plaintiff, the earn-

ings would be considerably less than the last amounts named. That during the year 1919 and probably for several years the company will not, at the present fare, earn the rate of return upon the value of its property found by the Master to be reasonable.

It is agreed by the parties hereto that the foregoing eight pages, together with the exhibits attached to the pleadings referred to and the copy of the Ordinance of March 16, 1899, set out in plaintiff's original bill and the reference to the Master's report, constitute a correct and substantial statement of the evidence introduced in Cause No. 214 in Equity, San Antonio Public Service Company vs. the City of San Antonio et al, United States District Court, Western District of Texas, San Antonio Division, before the Hon. Du Val West, District Judge, and the Hon. Frank H. Booth, Master in Chancery, both on the motion to dismiss and upon the hearing on the merits.

167 The parties hereto further agree that the charters of the City of San Antonio in effect March 16, 1899, and July, 1917, having been declared by their terms public acts, properly certified copies of same may be considered by the court without the necessity for copying said charters in their entirety in this agreed statement of the evidence.

(Signed) TEMPLETON, BROOKS, NAPIER & BROWN,
HOWARD TEMPLETON,
S. J. BROOKS,
W. P. NAPIER,
Solicitors for Complainant & Appellee,
San Antonio Public Service Company.

(Signed) R. J. McMILLAN,
Solicitors for Defendants & Appellants,
City of San Antonio, et al.

On this 24th day of January, A. D. 1920, the foregoing statement of the evidence on appeal having been presented to me, same is in all things approved and allowed and now hereby ordered filed as statement of the evidence to be included in the record on appeal, as provided for in the equity rules.

(Signed) DU VAL WEST,
United States District Judge,
Western District of Texas.

(Endorsed as follows:) No. 214 Eq. San Antonio Public Service Co. vs. City of San Antonio, et al. Agreed statement of evidence. Filed Jan. 24, 1920. D. H. Hart, Clerk, by W. D. Roodhuser, Chief Deputy.

168 In the United States District Court, Western District of Texas.

In Equity. No. 214.

SAN ANTONIO PUBLIC SERVICE CO.

vs.

CITY OF SAN ANTONIO et al.

Assignment of Errors.

The City of San Antonio and Sam C. Bell, Mayor, Ray Lambert, Andres Coy, Louis Heuermann, and Phil Wright, Commissioners, and R. J. McMillan, City Attorney, defendants and appellants, now come and file this their Assignment of Errors:

I.

The Court erred in holding that it had jurisdiction in this case.

II.

The Court erred in over-ruling the Defendant's plea to the jurisdiction and motion to dismiss.

III.

The Court erred in holding that the franchise ordinance of 1869 and the consolidation ordinance of 1917 did not constitute a binding contract and agreement precluding the Complainants from maintaining this action.

IV.

The Court erred in taking jurisdiction in this case and in refusing to dismiss same on motion, because complainant's petition showed upon its face that it was attempting to enjoin the City from demanding the compliance by Complainant with its own contract, voluntarily entered into, and accordingly there was no taking of property without due process of law, and the bill is without merit or equity, and the court without jurisdiction.

V.

The Court erred in issuing the writ in this case, because the undisputed evidence shows that the Complainant's the San Antonio Public Service Company was endeavoring to avoid by an injunction compliance with the contract made by it and its ancestor in right, the San Antonio Traction Company.

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VI.

The Court erred in issuing the writ herein, because, even should it be held that the franchise ordinance of 1899 and the Consolidation Ordinance of 1917 did not constitute a contract, said ordinances contained provisions with regard to the rate of fare, which at least constituted limitations and conditions annexed to the grant, which, the city, having under its charter the exclusive control over its streets, had the right to annex and which Complainant could not repudiate, at the same time asserting its other rights based upon the same grant.

VII.

The Court erred in issuing the writ because even if it be held that the franchise provision and agreement for a five cent fare, with transfers, was abrogated or invalidated by the State Half Fare Law, still the Complainant, the San Antonio Public Service Company, ratified, confirmed and re-accepted such provision and all existing conditions by applying for and accepting the Consolidation Ordinance of July, 1917.

VIII.

The Court erred in issuing the writ and holding that the City had no power to make a contract for rate of fare, because even should it be held that such was the case under the law as it existed in 1899, the same was not true in 1917, when the San Antonio Public Service Company applied for additional privileges and was granted same.

IX.

The Court erred in failing and refusing to confirm the Master's Report.

X.

The Court erred in over-ruling the Master and disaffirming his report in so far as he held that the Court was without power to issue the writ under the facts existing in this case and recommended that the Court dismiss the case.

XI.

The Court erred in disaffirming the report of the Master in issuing the writ, because under the facts as found by the Master the Court was without jurisdiction in the case and could not grant the relief prayed for.

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XII.

The Court erred in granting a writ in this case, because in July, 1917, when the Complainant, the San Antonio Public Service Com-

pany, succeeded to the franchises of the Traction Company and the Gas and Electric Company, it entered into a contract with the City of San Antonio, whereby it renewed the original agreement of its predecessor for a five-cent fare, with universal transfer, and further agreed to be bound by all of the limitations, duties, contracts, forfeitures and obligations imposed on or required of its predecessor at that time. At that time the City of San Antonio had amended its charter under the Home Rule Amendment to the Texas Constitution, and was a self-governing and independent municipality and did not derive its authority or powers from the Texas Legislature. It accordingly had the unquestioned authority to make this contract and agreement, and both it and the Complainants were bound by same.

XIII.

The Court erred in issuing the writ upon the record in the case, as it stood, for the reason that the Complainant, the San Antonio Public Service Company, furnishes the City of San Antonio and the contiguous suburbs with both street car service and gas and electric light service. The Complainant in this case is a corporation organized for those three purposes, and no proof of any character was made as to the earnings or losses in the gas and electric department of its business. Burden of proof being upon Complainants to sustain its case, it failed to discharge its burden of proof when it failed to show what its profits or losses were in their entirety.

XIV.

The Court erred in granting the writ of injunction in this case, because under all of the facts of the case as shown by the exhibits to the pleadings and evidence before the court on the motion to dismiss, and evidence before the Master, Complainant was not entitled in equity to the relief prayed for.

Wherefore, the Appellants pray that the decree be reversed and the cause dismissed, or in the alternative that the decree be reversed and cause remanded for a new trial, with appropriate instructions.

(Signed.) R. J. McMILLAN,
Solicitor for Defendant and Appellants.

171 (Endorsed as follows:) No. 214 Eq. San Antonio Public Service Co. vs. City of San Antonio, et al. Assignment of Errors. Filed Jan. 24, 1920. D. H. Hart, Clerk. By W. D. Rondthaler, Chief Deputy.

172 In the United States District Court, Western District of Texas.

In Equity. No. 214.

SAN ANTONIO PUBLIC SERVICE COMPANY

vs.

CITY OF SAN ANTONIO, SAM C. BELL, Mayor of said City; RAY LAMBERT, Andres Coy, Louis Heuermann and Phil Wright, Commissioners of said City; and R. J. McMillan, City Attorney of said City, Defendants.

Petition for Appeal.

The above named Defendants, conceiving themselves aggrieved by the order, judgment and decree entered on the 26th day of November, 1919, in the above entitled cause, do hereby appeal from said order, judgment and decree to the Supreme Court of the United States, and they pray that this their appeal may be allowed; and that a transcript of the record and proceedings and papers, including the report of the Master and the opinions of the court upon which said order, judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

(Signed.) R. J. McMILLAN,
Solicitor.

(Endorsed as follows:) No. 214 Eq. San Antonio Public Service Co. vs. City of San Antonio, et al. Petition for Appeal. Filed Jan. 24, 1920. D. H. Hart, Clerk. By W. D. Rondthaler, Chief Deputy.

173 In the United States District Court, Western District of Texas.

In Equity. No. 214.

SAN ANTONIO PUBLIC SERVICE COMPANY

vs.

CITY OF SAN ANTONIO, SAM C. BELL, Mayor of said City; RAY LAMBERT, Andres Coy, Louis Heuerman and Phil Wright, Commissioners of said City, and R. J. McMillan, City Attorney of said City, Defendants.

Entry.

It now appearing that the above named defendants have filed their petition for appeal from the order, judgment and decree herein rendered against them, and entered on or about the 26th day of November, 1919, to the Supreme Court of the United States, and have also

filed their assignment of errors pursuant to the rules of said Supreme Court, it is ordered and adjudged that said appeal from said order, judgment and decree be and the same is hereby allowed and granted, as prayed for in said petition for appeal, upon the said defendants giving their appeal bond to the plaintiff, with sufficient surety, in the penal sum of One Thousand and no/100 Dollars, conditioned for costs on appeal according to law.

(Signed) DU VAL WEST,
District Judge.

(Endorsed as follows:) No. 214 Eq. San Antonio Public Service Co. vs. City of San Antonio, et al. Order Fixing Appeal Bond. Filed Jan. 24, 1920. D. H. Hart, Clerk. By W. D. Rondthaler, Chief Deputy.

174 *Citation on Appeal.*

United States District Court, Western District of Texas, San Antonio Division.

No. 214. In Equity.

SAN ANTONIO PUBLIC SERVICE COMPANY

vs.

CITY OF SAN ANTONIO et al.

UNITED STATES OF AMERICA, *ss:*

To San Antonio Public Service Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the 10th day of March, A. D. 1920, pursuant to an order allowing an appeal filed and entered in the clerk's office of the District Court of the United States for the Western District of Texas from a final decree signed, filed and entered on the 26th day of November, 1919, in that certain suit, being in equity No. 214, wherein City of San Antonio, Sam C. Bell, Mayor, Ray Lambert, Andres Coy, Louis Heuermann, and Phil Wright, Commissioners, and R. J. McMillan, City Attorney, are defendants and appellants, and you are plaintiff and appellee, to show cause, if any there be, why the decree rendered against said appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness, the Honorable Du Val West, United States District Judge for the Western District of Texas, this 9th day of February, A. D.

1920, and of the Independence of the United States the one hundred and forty-fourth.

DU VAL WEST,
United States District Judge for the Western District of Texas.

[The Seal of the U. S. District Court, Western Dist. Texas, San Antonio.]

Attest:
D. H. HART,
Clerk,
By W. D. RONDTHALER,
Chief Deputy Clerk.

Received copy and acknowledge service of the within citation this 10th day of February, A. D. 1920.

TEMPLETON, BROOKS, NAPIER & BROWN,
S. J. BROOKS,
HOWARD TEMPLETON, AND
WALTER P. NAPIER,
Solicitors for Plaintiff and Appellee, San Antonio Public Service Company.

174½ In the United States District Court, Western District of Texas.

In Equity. No. 214.

SAN ANTONIO PUBLIC SERVICE COMPANY

vs.

CITY OF SAN ANTONIO, SAM C. BELL, Mayor of said City; RAY LAMBERT, Andres Coy, Louis Heuermann, and Phil Wright, Commissioners of said City, and R. J. McMillan, City Attorney of said City, Defendants.

Bond on Appeal.

Know all men by these presents: That we, the City of San Antonio, a municipal corporation duly chartered under the constitution and laws of the State of Texas, acting herein by and through Sam C. Bell, its Mayor, and Fred Fries, its clerk, hereunto duly authorized, and Sam C. Bell, Ray Lambert, Louis Heuermann, Phil Wright, Andres Coy and R. J. McMillan, as Principals, and W. W. Collier and Ernest L. Brown as sureties, of the County of Bexar, State of Texas, are held and firmly bound unto the San Antonio Public Service Company in the sum of One Thousand Dollars ($1,000.00) lawful money of the United States, to be paid to it and its successors and assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally,

and each of our successors, heirs, executors and *exmonistrators*, by these presents.

Sealed with our hands and dated this 27th day of January, 1920.

Whereas, the above named City of San Antonio et al. have prosecuted an appeal to the Supreme Court of the United States to reverse the judgment of the District Court for the Western District of Texas in the above entitled cause:

Now, therefore, the condition of this obligation is such that if the above named City of San Antonio et al. shall prosecute their said appeal to effect and answer all costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

CITY OF SAN ANTONIO,
By SAM C. BELL,
Mayor;
W. W. COLLIER,
ERNEST L. BROWN,
Sureties.

Attest:
FRED FRIES,
City Clerk.
[SEAL.]

L. HEUERMANN.
R. J. McMILLAN.
PHIL WRIGHT.
SAM C. BELL.
RAY LAMBERT.
ANDRES COY.

The within bond is approved both as to sufficiency and form this 29th day of January 1920.

DU VAL WEST,
United States District Judge,
Western District of Texas.

(Endorsed:) 214 Equity. U. S. Dist. Ct., Western Dist. of Texas. S. A. Public Service Co. vs. City of S. A. et al. Filed Jan. 29, 1920. D. H. Hart, Clerk, by W. D. Rondthaler, Chief Deputy.

175 In the United States District Court, Western District of Texas.

In Equity. No. 214.

SAN ANTONIO PUBLIC SERVICE COMPANY

vs.

CITY OF SAN ANTONIO, SAM C. BELL, Mayor of said City; RAY LAMBERT, Andres Coy, Louis Heuermann, and Phil Wright, Commissioners of said City; and R. J. McMillan, City Attorney of said City, Defendants.

Præcipe and Agreement as to Documents Which Shall Constitute the Record on Appeal.

The Clerk will include the following named documents in the transcript of the record to be filed in the Supreme Court:

1. Plaintiff's Original Bill of Complaint;

2. Plaintiff's Supplemental Bill;

3. Plaintiff's First Amendment to Original Bill;

4. Defendant's Plea to the Jurisdiction and Motion to Dismiss;

5. Memorandum Opinion of the Court on Plea to the Jurisdiction and Motion to Dismiss;

6. Order Overruling Plea to the Jurisdiction and Motion to Dismiss;

7. Defendant's Original Answer;

8. Order Appointing Special Master;

9. Report of Special Master;

10. Plaintiff's Exceptions to Report of Special Master;

11. Opinion of Court on Exceptions to Report of Special Master;

12. Order of Court on Plaintiff's Exception to Report of Special Master;

13. Final Decree;

14. Agreed Statement of the Evidence, With Order of Court Approving Same;

15. Assignment of Errors;

16. Petition for Appeal;

17. Order Allowing Appeal;

18. Citation on Appeal;

18½. Bond on Appeal;

176 19. Præcipe and Agreement as to Documents which shall Constitute the Record on Appeal;

20. Clerk's Certificate.

(Signed) TEMPLETON, BROOKS, NAPIER & BROWN,
HOWARD TEMPLETON,
S. J. BROOKS,
W. P. NAPIER,
Solicitors for Plaintiffs.

(Signed) R. J. McMILLAN,
Solicitors for Defendants.

(Endorsed as follows:) No. 214 Eq. San Antonio Public Service Co. vs. City of San Antonio et al. Præcipe for Record on Appeal. Filed Jan. 24, 1920. D. H. Hart, Clerk, by W. D. Rondthaler, Chief Deputy.

177 *Clerk's Certificate.*

I, D. H. Hart, Clerk of the District Court of the United States, in and for the Western District of Texas, do hereby certify that the foregoing on 176 pages, numbered from 1 to 176, is a true and correct transcript of proceedings had and orders entered as therein stated, in Cause No. 214 Equity, In the Matter of The San Antonio Public Service Company vs. City of San Antonio, and Sam C. Bell, Mayor, Ray Lambert, Louis Heuermann, Andres Coy and Phil Wright, City Commissioners, and R. J. McMillan, City Attorney, as the same appear on file and of record in this office, except that the Original Citation on Appeal is inserted herein at page 174 instead of a copy thereof.

And I do further certify that the foregoing record embraces only such pleadings, process and orders, as are specified in the præcipe filed by appellant and agreed to by appellee.

Witness my official signature and the seal of said United States District Court, at office in the City of San Antonio, Texas, this 10th day of February, A. D. 1920.

[The Seal of the U. S. District Court, Western Dist. Texas, San Antonio.]

D. H. HART,
Clerk,
By W. D. RONDTHALER,
Chief Deputy Clerk.

Endorsed on cover: File No. 27,511. W. Texas D. C. U. S. Term No. 756. City of San Antonio et al., appellants, vs. San Antonio Public Service Company. Filed March 1st, 1920. File No. 27,511.

In the Supreme Court of the United States, October Term, 1920.

No. 263.

CITY OF SAN ANTONIO et al., Appellants,

versus

SAN ANTONIO PUBLIC SERVICE COMPANY, Appellee.

Stipulation and Addition to Record.

It is hereby stipulated and agreed between the Appellants and the Appellee in the above entitled cause that the hereinafter copied sections of the city charters of the City of San Antonio are true and correct copies of the said sections from the respective charters from which they purport to be quoted, viz:

The city charter of said City of San Antonio that was in force and effect on March 16, 1899 contained the following sections:

Sec. 1. "Be it enacted by the Legislature of the State of Texas:

That all inhabitants of the city of San Antonio are hereby constituted a body corporate and politic, and shall have power:

First. To sue and be sued.

Second. To purchase and hold real and personal property for the use of the city. (Amendment of 1889.)

Third. To sell and convey any real or personal estate owned by the city, and make such order respecting the same as may be conducive to the interests of the city; provided, that the said city shall not sell any lands owned by said city lying in the territory north of the county poor farm and west of the San Antonio river, and shall not rent or lease the same for any purpose for a term exceeding ten years at any one time. (Amendment of 1889.)

Fourth. To make all contracts, and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate or administrative powers.

Fifth. To have a corporate seal."

Sec. 42. "The city council shall have the care, management and control of the city and its property and finances; and shall have power to enact and ordain any and all ordinances not repugnant to the constitution and laws of this state, and such ordinances to alter; modify or repeal, and shall have power by ordinance:"

Sec. 57. "To have the exclusive control and power over the streets, alleys, sidewalks, lanes, avenues and public grounds and highways of the city and to abate and remove encroachments or obstructions thereon; to open, alter, widen, straighten, extend, establish, abolish, regulate, grade, regrade, clean, pave, macadamize or otherwise improve the same; to put drains and sewers therein and to prevent the encumbering thereof in any manner, and to protect the same from any encroachments or injury."

Sec. 99. "To direct and control the laying and construction of railroad tracks, turnouts and switches, or prohibit the same in the streets, avenues and alleys, and location of depot grounds within the city; to require that railroad tracks, turnouts and switches shall be so constructed as to interfere as little as possible with the ordinary travel and use of the streets, avenues and alleys, and that sufficient space shall be left on either side of said tracks for the safe and convenient passage of teams, carriages and other vehicles and persons; to require railroad companies to keep in repair the streets, avenues or alleys through which their track may run, and if ordered by the city council to light the same and to construct and keep in repair suitable crossings at the intersections of streets, avenues and alleys, and ditches, sewers and culverts, when the city council shall deem necessary; to direct the use and regulate the speed of locomotive engines within said city or prevent, or prohibit the use or running of the same within the city."

The city charter of said city that was in effect in July, 1917 contained the following sections:

Sec. 51. "The Board of Commissioners shall have the care, management and control of the City, its property and finances, and shall have power to enact, ordain, alter, modify or repeal any and all ordinances not repugnant to this Charter and the Constitution and laws of the State, and shall have power, by ordinance:"

Sec. 90. "To have the exclusive control and power over the streets, alleys, sidewalks and public grounds and highways of the City, and to abate and remove encroachments or obstructions thereon."

Sec. 94. "To direct and control the laying and construction of the railroad and street railway tracks, turnouts and switches and prohibit the same in the streets, avenues and alleys, and regulate the location of depot grounds within the City."

This stipulation is made in lieu of certified copies provided for in last paragraph of the "Statement of Evidence" Trans. of Record p. 124 and supplements said statement.

F. J. McMILLAN,
Attorneys for Appellants.
HOWARD TEMPLETON,
S. J. BROOKS,
WALTER P. NAPIER,
TEMPLETON, BROOKS, NAPIER & BROWN,
Attorneys for Appellee.

[Endorsed:] File No. 27,511. Supreme Court U. S., October Term, 1920. Term No. 263. City of San Antonio et al., Appellants, vs. San Antonio Public Service Company. Stipulation and addition to record. Filed March 21, 1921.

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No. 263.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

CITY OF SAN ANTONIO, *et al*, APPELLANTS,

versus

SAN ANTONIO PUBLIC SERVICE COMPANY, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

Brief for Appellants, Defendants Below.

STATEMENT OF THE CASE.

The San Antonio Public Service Company, a Texas corporation, instituted this suit on the 27th day of November, A. D. 1918, against the City of San Antonio, Sam C. Bell, Mayor, Ray Lambert, Louis Heuermann, Andres Coy and Phil Wright, City Commissioners, and R. J. McMillan, City Attorney, and prayed for an injunction.

Plaintiff's petition after alleging that it was a private corporation, duly incorporated under the laws of the State of Texas, for the purpose of operating a street railway sys-

tem, which system it was engaged in operating in the City of San Antonio, Texas, and that the defendants cited constituted a Texas Municipal Corporation and the principal officers thereof further alleged as follows:

"That on or about the 16th day of March, A. D. 1899, the City of San Antonio passed an ordinance extending the time of the franchise rights and privileges to the San Antonio Gas Company, Mutual Electric Light Company; the San Antonio Street Railway Company, and the San Antonio Edison Company, and the ordinance among other provisions contained the following pertinent to the issues therein involved.

"The rights, privileges and franchises heretofore granted to and existing in the San Antonio Gas Company, Mutual Electric Light Company, San Antonio Street Railway Company and the San Antonio Edison Company shall be and are hereby extended from this date so that the rights, privileges and franchises of said companies shall exist until and shall expire on the first day of July, A. D. 1940. Said extension of time is granted to said Companies and upon the following terms and conditions, to-wit:

"Said San Antonio Street Railway Company and said San Antonio Edison Company shall, after their acceptance of the extension hereby granted, pave all tracks between the rails and all the space between double tracks, and twelve inches (12") on the outside of their tracks, on any street occupied by them, or either of them, which shall hereafter be paved by the City, as and when the City paves and with the same material as used by the City, and shall keep the same in reasonable repair and in like conditions as the City keeps adjoining streets.

"That said street railway companies shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other. (R-3).

"The rights, privileges and franchises, or either of them, herein referred to and hereby extended, may be assigned by the grantee or grantees to any person or corporation, but the conditions and limitations of this Ordinance shall apply to the assignee thereof. (R-3).

"Said companies or either of them, or their assigns, shall file with the City Clerk on or before the first day of May, A. D. 1899, its or their written acceptance of the terms and conditions of this Ordinance; otherwise this Ordinance shall have no force or effect. (R-4).

"Said Companies shall be subject to all Ordinances of this City, except in so far as such Ordinances conflict herewith. (R-4).

"That the provision of said ordinance above set out relative to charging a 'five cent fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other,' was not intended by the parties as anything more than a mere regulation of the rate for the time being and a fixing a rate of fare that was deemed just and reasonable under the circumstances and conditions existing at that time and was never intended as a contract; but plaintiff says that if it was intended as a contract, then, (1) The City has never been authorized by the Legislature of the State of Texas to make any such contract and had no power to make such a contract. Said provision, if intended as a contract was illegal and void because it was forbidden and prohibited by Section 7, Art. 1, of the Bill of Rights in the Constitution of the State of Texas, which provides that 'no irrevocable or uncontrollable grant of special privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.'

"Said provision, if intended as a contract was also illegal and void because contrary to public policy and was one calculated to deprive a public service corporation, un-

der conditions that might thereafter arise, of its ability to render adequate service to the public and same was an attempt to barter away the police power of the State and City with reference to regulating rates.

"That thereafter, to-wit, on or about the 4th day of April, A. D. 1900, the San Antonio Traction Company, a corporation duly incorporated under the laws of Texas, became the owner of all the rights, privileges and franchises of every kind and character conferred upon the San Antonio Street Railway Company by the terms of said ordinance and thereby became subject to the legal obligations therein imposed and thereafter on or about the 1st day of July, A. D. 1917, your petitioner the San Antonio Public Service Company, by and with the consent of the City Council of said City became the owner of all said rights, privileges and franchises granted under said ordinance and is still such owner." (R 4-5).

Petitioner continuing then alleged the reasonable value of its plant devoted to trackage purposes was in excess of six million, ninety-one thousand dollars, ($6,091,000.00) and that at the time of the passage of the Ordinance of March 16, 1899, the five cent (5c) fare then referred to was sufficient to pay operating expenses and a fair return on the investment, but that because of the increase in the cost of labor and operating expenses, incident to the European War, and the general advances in prices it was at the time of filing the bill, unable to pay a fair return on its investment.

Continuing the petitioner alleged: "That after the passage of the ordinance of 1899 the State passed what was commonly known as the Half Fare Law requiring it and other similar companies to transport certain children for half fare. That its predecessor, the San Antonio Traction Company contested this law in the Altgelt case, alleging that it impaired the obligation of its contract with the city

for a five cent (5c) fare. That its contention was overruled by all of the State courts and the Supreme Court of the United States. That since that time it has complied with said law to its great loss. That said provision in the ordinance of 1899 did not constitute a contract but was simply intended as a regulation. That if it was intended as a contract it was beyond the power of the city. Petitioner continuing alleges the passage by the city in 1903 of a half fare ordinance for children and the passage in 1907 of an ordinance requiring street railway companies to carry firemen and policemen free. It is not alleged that either of these ordinances was ever contested or even objected to.

Plaintiff further alleges that if the City of San Antonio ever intended the five cents fare provisions contained in the franchise ordinance of March 16th, 1899, as a binding contract, (which is not admitted but denied), then the said City by its act in passing and enforcing the Half Fare Ordinance above referred to, and in passing and enforcing the ordinance above referred to requiring the free transportation of policemen and firemen, and by its acts in recognizing the validity of and assisting in the enforcements of the Half Fare Law passed by the State of Texas, above referred to, and by ratifying and adopting same and by each of said acts, and by various other acts subsequent to the passage of the ordinance of March 16th, 1899, has repealed, abrogated and annulled said five cents fare provision in said ordinance and has long since recognized that it was no longer a binding provision in said ordinance and neither the said City nor this plaintiff nor its predecessor, the San Antonio Traction Company, has treated or regarded said provision as a binding contract since the final decision by the Courts in the Altgelt case above referred to and said City is now estopped by reason of each and all of its said acts from claiming that said provision is

binding on this plaintiff so as to prevent it from increasing its rate of fares to such point as will pay its operating expenses and a fair return on its investment." (R-8).

Petitioner then alleges that on the 20th day of March, A. D. 1918, the City of San Antonio passed an ordinance prohibiting any public utility company operating in the city, from raising its rates without first applying for and obtaining the consent of the Mayor and Commissioners and that having made such application in compliance with said ordinance, the petition had been by the Mayor and Commissioners, denied.

Continuing petitioner alleges:

"That, if your petitioner should raise the rate of fare to be charged by it for carrying passengers on its street railway above five cents, the said City and its Commissioners and City Attorney will undertake to forfeit its franchise and to impose the penalties provided for in said ordinance and by various other methods will undertake to prevent its doing so and will seriously interfere with and harass it in the operation of its properties and will subject it to numerous and divers suits and prosecutions for penalties and forfeitures and will undertake to forfeit its charter and cast a cloud upon its right to operate said street railway system; and will institute numerous prosecutions against its officials to enforce penalties under said ordinance, all of which will materially injure if not destroy the credit of this plaintiff and will materially interfere with its performing its duty to the public and rendering adequate service to the public of San Antonio and will materially interfere with it in the operation of its plant and cause it serious and irreparable injury and damage for which it will have no adequate remedy at law."

"Plaintiff desires now to raise the rate of fare to be charged to passengers to seven (7c) per passenger for adults and to one-half that amount for the persons required

by the State Half Fare Law to be carried at half fare or to such other sum as the Court may find will be necessary in order for it to earn its operating expenses and a fair return on its investment, but it is unable to do so because of said ordinances and of the threatened injury and damage by the City and its Commissioners as hereinbefore set out, which is all that prevents plaintiff from at once so raising its said rates."

"Plaintiff shows that said ordinances are contrary to the Constitution of the United States and void in so far as they interfere with and prohibit it from raising its rates of fare to such a point as will enable it to earn its operating expenses and a fair return on its investment, and the enforcement thereof will deprive this plaintiff of its property without due process by law in violation of the constitution and laws of this State and of the United States and particularly in violation of that portion of Section One of the Fourteenth Amendment to the Constitution of the United States which provides that 'No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States. Nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.' And also in violation of that portion of the Fifth Amendment of the Constitution of the United States which provides that no person shall be 'deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation'; (R-11) and concluding plaintiff prays for an injunction restraining the City of San Antonio and its officers from interfering with it in any way and putting into force and effect a seven cents (7c) fare for adults and one-half (½) of that amount for the class of passengers required by the

State Half Fare Law, to be carried for half fare and for general relief," etc.

The petition was verified and had attached as exhibits various ordinances referred to therein, among others an ordinance passed by the City after the passage of the State Half Fare Law requiring street railway companies to carry children for a two and one-half cent (2½c) fare, and an ordinance requiring street railway companies to transport free of charge persons serving in the police and fire departments, of both of which ordinances petitioner complained in its original bill; against the latter ordinance, however, it at no time asked for any relief.

After the filing of the original bill with leave of the Court, plaintiff filed a First Supplemental Bill alleging an additional increase in expenses due to a raise in wages and later with leave of the court and by agreement of parties, it filed an amendment to its original bill setting up certain penal ordinances passed by the City of San Antonio subsequent to the granting of the franchise of 1899, said penal ordinances requiring in effect that street railway companies transport passengers for a fare of five cents (5c).

Appellants, defendants below, filed a motion to dismiss and challenged the jurisdiction of the court as follows:

"Respondents move the Court to strike out and dismiss the bill filed by complainant in this case, and to proceed no further with same for the reason that said bill shows upon its face that this case is not within the jurisdiction of this court, and because the allegation that this Court has jurisdiction is fictitious and fraudulent and because a valid cause of action in equity is not stated in the bill."

"Respondents would further show to the Court that Complainant, in paragraph four of its bill, alleges that on or about the 1st day of July, A. D. 1917, it became, with the consent of the City of San Antonio, the owner of all

of the rights, privileges and franchises previously granted to the San Antonio Traction Company. Complainant has failed to attach to the bill a copy of said ordinance consenting to the transfer of such rights to the complainant, and respondents here now attach a certified copy of said ordinance to this plea and mark same Exhibit "A", for identification. That by the terms of said ordinance, which was accepted by the San Antonio Public Service Company, all of the limitations, duties, contracts, forfeitures and obligations imposed on or required of the San Antonio Traction Company at the time when same was passed, to-wit, the 10th day of July, A. D. 1917, were imposed on and required of the San Antonio Public Service Company. A certified copy of Complainant's acceptance of said ordinance it attached hereto. That at said time there was a valid city ordinance in effect requiring the transportation of passengers by street railway companies for (5c) five cents, with transfers. Accordingly respondents represent to the Court that the City of San Antonio, in demanding of complainant a compliance with its agreement, simply requires of it the performance of its own valid contract, voluntarily entered into. That the demand upon the part of the City of San Antonio is not a taking of complainant's property without due process of law, and accordingly there is no federal question in this case, of such a character as to confer jurisdiction upon this Court." (R 20).

To this plea was attached the ordinance referred to therein which, omitting its formal portions, is in part as follows:

"The San Antonio Traction Company and the San Antonio Gas & Electric Company are hereby granted full and complete right and authority to transfer and assign unto the San Antonio Public Service Company, a corporation incorporated under the laws of the State of Texas, with its principal office in the City of San Antonio, Bexar County,

Texas, all rights, privileges and franchises of any and every nature whatsoever heretofore granted to and now existing in and enjoyed by the San Antonio Traction Company and San Antonio Gas & Electric Company; said transfer and assignment to be made within ninety days after this ordinance shall become effective.

"The rights given to said Companies in Section 1, are subject to the conditions hereinafter set forth. All the limitations, duties, contracts, forfeitures and obligations imposed on or required of either of said companies at this time shall be imposed on and required of the San Antonio Public Service Company.

"The San Antonio Public Service Company hereby agrees that it will cause a line to South San Antonio, Bexar County, Texas, to be built and in actual and continuous operation, within ninety days from the date upon which this ordinance becomes effective.

"The ordinance shall not take effect until the San Antonio Public Service Company shall, by proper resolution, filed with the City Commissioners of San Antonio, accept all the provisions and limitations of this ordinance, which acceptance shall be filed on or before ninety days after the final passage of same.

"Passed and approved this 10th day of July, A. D. 1917." (R 22).

There was also attached a copy of written acceptance filed on the 14th day of August, 1917, by the San Antonio Public Service Company, which contained the certificate of R. C. Jones, its Secretary, to the effect that at a meeting of the Board of Directors of said Company held on August 11, 1917, the ordinance was accepted without reserve.

Defendant's plea to the jurisdiction and motion to dismiss coming on to be heard, same was overruled by the Court and a memorandum opinion handed down which is on pages 26 to 30 inclusive of the record. It is unnecessary

accordingly, to quote this opinion further than to say the Court held that neither the franchise ordinance of 1899 nor the consolidation ordinance of 1917 constituted a contract between the city and the railway company; that the city was without authority to enter into an agreement of this character should it be construed as an agreement; that a cause of action for equitable relief was stated upon the face of the bill. An order pursuant thereto was accordingly entered and the defendants given ten (10) days from February 20, 1919, in which to answer. Within that time the respondents filed their answer reserving therein all rights under their plea to the jurisdiction and motion to dismiss and in such answer among other things pleaded as follows:

"Respondents move the court to strike out and dismiss complainant's bill because same shows upon its face that complainant is attempting to enjoin respondents from requiring of complainant performance of its own voluntary contract and undertaking, to transport passengers during the life of its franchise contract with the City of San Antonio for a five cent fare with universal transfer.

"Respondents move the Court to strike out and dismiss complainant's bill because same is lacking in equity and shows upon its face that the complainant is not entitled to the relief prayed for, or to any relief whatsoever.

"Further answering, and in bar of complainant's cause of action in this case, respondents represent to the Court that complainant's predecessor, the San Antonio Traction Company, voluntarily asked the City of San Antonio for and accepted a forty-year franchise, granting the privilege to use certain streets and public places of the City for the street railway business. That said franchise contract contained, among other provisions, the one set out in complainant's bill, requiring complainant's predecessor to transport passengers within the City of San Antonio for five cents with universal transfer.

"That after this franchise was granted and accepted, some question arose as to its validity. That the City of San Antonio, acting in good faith in the matter, passed a confirmatory ordinance confirming said franchise in and to complainant's predecessor, said confirmatory ordinance containing a provision that the franchise was subject to all existing ordinances of the City of San Antonio and its own terms, and this confirmatory ordinance was expressly accepted by complainant's predecessor and at said time there existed, in addition to the Traction Company's agreement to haul passengers for a five cent fare, a city ordinance requiring same and providing for a universal transfer.

"That when the State passed the Half Fare Bill, complainant contented itself with litigating the question out with a private individual, and upon the termination of that litigation, adversely to it, made no offer to surrender its franchise, took no legal steps of any character whatsoever with regard to the City, but continued to exercise such franchise, complying with the provision for hauling passengers for five cents with universal transfer, and complying with the State Half Fare Law.

"That this condition existed for a period of some twelve or fourteen years, when, in July, 1917, the San Antonio Gas & Electric Company and the San Antonio Traction Company petitioned the City of San Antonio to permit them to transfer their franchise rights to the San Antonio Public Service Company, representing, which was a fact, that they could not make the transfer of these franchises without the consent of the City, and further representing that the right to so consolidate would be an extremely valuable privilege to them, which would in no way affect the public to its detriment.

"That the City of San Antonio granted to these companies the right prayed for upon certain conditions, which were set out in an ordinance a copy of which is hereto at-

tached, marked Exhibit "A", which ordinance contained among other provisions, the following one:

" 'The rights given to said companies in Section 1 are subject to the conditions hereinafter set forth. All the limitations, duties, contracts, forfeitures and obligations imposed on or required of either of said companies at this time shall be imposed on and required of the San Antonio Public Service Company.'

"This ordinance was by the San Antonio Public Service Company by resolution of its Board of Directors duly accepted and written acceptance of same filed with the City Clerk. This petition for consolidation and this acceptance of this ordinance occurred during the summer of 1917, and at and about just the time when complainant now alleges it was losing money.

"Respondents would show to the court that when complainant applied for and accepted this consolidation ordinance the State Half Fare Law was in existence and had been in existence for some thirteen or fourteen years. That the City ordinance requiring the hauling of passengers for five cent fare was in existence and had been in existence for many years; and both were being complied with by complainant's predecessor. That the franchise contract for a five cent fare with universal transfer was in existence and was at that time being complied with by the San Antonio Traction Company. That respondents thought and believed at the time that there was no question as to the binding force and effect of the five cent fare provision; that no complaint was made in regard to the same by the Public Service Company in asking for this valuable privilege, and no protest with regard to the existence of the half-fare law or the city ordinance was urged when the City was being asked to give them this valuable right.

"That at the time the constitution of the State of Texas had been amended granting to cities and towns of over five

thousand inhabitants the right of self-government and home rule, and under such constitutional amendment the exclusive control of the streets and alleys and other public places of such cities, had been delegated by the Legislature of the State, together with the right to regulate street railway transportation within the city limits and to annex such conditions to franchise rights for the use of such streets as might by the cities be deemed necessary or desirable.

"Respondents would show to the court that this agreement upon the part of the Traction Company to haul passengers for five cents with universal transfer was one of the principal considerations moving to it for the granting of this franchise. Should the court hold that the complainant is entitled to continue to operate upon its streets, charging a higher or different rate of fare than that agreed upon in the contract, then the Court in effect makes a new contract between the City and the Company, and grants to the Company rights which the City would not have granted to it and which it does not care to have it exercise upon its streets and public places.

Respondents would show to the Court that the complainant because of its action in the premises, is estopped to question the right of the City to make this contract or to annex this condition to this franchise grant, in that the complainant by applying for and accepting this consolidation ordinance under the conditions outlined bound itself to exercise its franchise in the manner provided for, and in no other manner whatsoever, and said complainant is without standing in this Court as a court of equity, and this Court will not interpose the equitable remedy of injunction on behalf of the complainant under these circumstances." (R-32).

Defendants filed certain denials relating to the various allegations in the original bill, the cost of operating the property, etc., and prayed, as they have heretofore prayed,

that the rate prayed for be denied. This answer having been filed, the Court being of the opinion that the cause could be more expeditiously handled by reference, it was upon the 5th day of May, 1919, referred to a Master with instructions to take proof with respect to the issues involved and report his findings of law and fact. (R 38).

A great volume of testimony, both oral and documentary was taken before the Master whose report was not filed until August 27th, 1919, almost four months later. (R 38-92).

The Master reported the following legal conclusions among others to the Court:

"The power to prescribe the rates to be charged by persons and corporations engaged in the performance of a public service is legislative in its nature, and may be delegated to a commission. In the exercise of this power the legislature or commission may do anything, or prescribe any rule or rate they please, within the limit that the act done, rule or rate prescribed shall not operate to deprive the regulated person or corporation of property without due process of law, or to deny them the legal protection of the law.

"The limitation stated fixed the power and authority of the Courts to interfere, and prescribes the bounds within which they may exercise their functions. They can interfere with the legislative function only when it is found that constitutional guarantees have been impinged or denied.

"In interposing their authority and power, the Courts have no discretion to exercise. When it is said that the Courts have the power to inquire whether a body of rates prescribed by the legislature or a commission are unjust and unreasonable, what is meant is that they may do this when the rate prescribed is unjust and unreasonable to the extent that it works a practical destruction of rights of property.

"The Courts do not possess the power to revise or change the rules or rates prescribed, nor determine whether one is preferable to another; nor what is fair and reasonable under the circumstances of particular cases."

"A person or corporation engaged in a public service is entitled to a fair return upon the value of that which is employed in the public service; but the mere fact that it is unable to do this is not conclusive that the rate prescribed is unjust or unreasonable, in the constitutional sense."

"While the public service company is entitled to a fair return, this is limited by two things, (a) that there is no public guarantee, and (b) if it is unable to earn a fair return, when that is due not to the rate itself but to conditions over which the legislature or commission has no control, the Courts cannot interfere. The Constitution contains no guarantee against losses due to competition or adverse conditions of market with respect to the cost of labor, material or supplies."

"The Courts are authorized to intervene in such cases only because of some definite, affirmative action by the legislature or commission." (R-51).

He stated further, as a matter of fact that the Company was not at the time getting a return on its investment and probably would not do so for several years (R 88); that the rate was reasonable when fixed by the franchise ordinance and that the conditions that prevented its now yielding a fair return were the increase in wages, the increase in cost of material, and operating, the great advances in all commodities caused by the war and jitney competition; and that in his opinion the court was without jurisdiction or authority to entertain the bill under the circumstances, and he recommended that the bill be dismissed. The Master's report is very full and covers the various matters of valuation, replacement, reserve, depreciation, etc., but it is unnecessary to dwell upon these features in the present stage of the case.

To the Master's report the plaintiff filed some thirty-two (32) exceptions. The various exceptions having a number of sub-heads. (92-111).

The Court on the hearing of the exceptions to the Master's report, confined same to the sole question as to his recommendation that the bill be dismissed. Upon this hearing Judge West handed down a memorandum opinion sustaining the exceptions to the Master's report in so far as he recommended the dismissal of the bill, and upon that opinion an order was entered on the 3rd day of November, 1919, in accordance therewith, to which the defendant excepted. Following this order a final decree was entered in the case enjoining the defendants and each of them and their successors from enforcing the various ordinances complained of by the petitioner, and taxing all the costs incurred against the said defendants. Exception was taken by the defendants and notice of appeal given. (R 117).

The evidence introduced in the case on the plea to jurisdiction and motion to dismiss and before the special Master upon reference established the following:

"Prior to March, 1899, the San Antonio Gas Company, the Mutual Electric Light Company, the San Antonio Street Railway Company and the San Antonio Edison Company were public utility companies, duly incorporated under the laws of the State of Texas and exercising the franchises granted to them by the City of San Antonio in and upon the streets, etc., of said city. The San Antonio Street Railway Company and the San Antonio Edison Company were incorporated for the purpose of constructing, owning and operating street railway systems in the City of San Antonio, and by virtue of franchises theretofore granted by said city were on March 16, 1899, and prior thereto operating lines of street railway on the streets of said city.

Upon the request of said companies and at the date last named, to-wit, March 16, 1899, the City Council of said city enacted an ordinance whereby it extended said

rights and privileges and the franchises of the said companies from 1924 to the first day of July, 1940. Said ordinance contained among other things the following two provisions: (1) "That said Street Railway Companies shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other;" "Section 4, Said companies or either of them or their assigns shall file with the City Clerk on or before the first day of May, A. D. 1899, its or their written acceptance of the terms and conditions of this ordinance; otherwise this ordinance shall have no force or effect" A true copy of said complete ordinance of March 16, 1899, is set out in Complainant's Original Bill of Complaint. Each of said companies, acting through their duly accredited agents and officers, with authority from their board of directors, duly filed with the City Clerk within the time limit fixed by the ordinance their written acceptance of the terms and conditions of same.

At the time of the passage of said ordinance and the acceptance of same by the said companies the charter of the City of San Antonio, granted to it by the Legislature of the State of Texas, then in force, contained the following provisions: "Be it enacted by the Legislature of the State of Texas: That all inhabitants of the City of San Antonio are hereby constituted a body corporate and politic, and shall have power • • • Sec. 99. To direct and control the laying and construction of railroad tracks, turnouts and switches, or prohibit the same in the streets, avenues and alleys, and location of depot grounds within the city to require that railroad tracks, turnouts and switches shall be so constructed as to interfere as little as possible with the ordinary travel and use of the streets, avenues and alleys and that sufficient space shall be left on either side of said tracks for the safe and convenient passage of teams, carriages and other vehicles and persons;

to require railroad companies to keep in repair the streets, avenues, or alleys through which their track may run, and if ordered by the City Council to light the same and to construct and keep in repair suitable crossings at the intersections of streets, avenues and alleys, and ditches, sewers and culverts, when the City Council shall deem necessary to direct the use and regulate the speed of locomotive engines within said city or prevent or prohibit the use or running of the same within the city.

Section 100. Exclusively to prevent, control and regulate everything connected with city railroads, and to make such rules and regulations for the same as the City Council may deem necessary."

The Legislature of the State of Texas on April 10th, 1903, enacted what is known as the "Half Fare Law," requiring street railway companies in cities and towns of not less than forty thousand inhabitants to carry children under twelve years of age for one-half fare charged adults and to issue tickets in lots of twenty to school children under seventeen years of age for one-half the fare charged adults and to carry children under five years of age, attended by a passenger above that age, free of charge, and provided a penalty for violation thereof.

On November 17, 1903, the City of San Antonio enacted an ordinance requiring the street railway companies in said city to carry school children under the age of twelve (12) years for two and one-half cents (2½)c) each and to sell tickets to students under seventeen years of age in the manner required by the said "Half Fare" Law above referred to. Said ordinance provided for penalties, and a true copy of the same is set out in full as Exhibit C, Plaintiff's Bill of Complaint.

The City of San Antonio was at the time of the passage of said State "Half Fare" Law and is still a City of over forty thousand inhabitants and said act applies to all street

railways operating in this City. This act of the Legislature was contested by the San Antonio Traction Company, which had succeeded to the rights of the San Antonio Edison Company, and the San Antonio Street Railway Company, on the ground that the provision in the franchise ordinance of March 16th, 1899, as to fares constituted a contract. The case in which this contest was made was that of George Altgelt vs. San Antonio Traction Company, filed in the District Court of Bexar County, Texas. Judgment was rendered against the Company in the District Court and an appeal was taken by it to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, where said judgment was affirmed in an opinion reported in 81 Southwestern Reporter, page 106, styled San Antonio Traction Company vs. Altgelt. A writ of error was taken to the Supreme Court of the United States, where the decision of the Texas courts was affirmed in the case of San Antonio Traction Company vs. Altgelt, 200 U. S., page 304, and ever since the date of the decision of the Supreme Court of the United States the San Antonio Traction Company and its successor, the San Antonio Public Service Company, have complied with the terms of said statute and said City Ordinance and carried the persons therein designated for two and one-half cents (2½c) and children under five years of age, attended by a passenger above that age, free.

The said State Half Fare Law has never been repealed or modified and is still in full force and effect, and the said City ordinance has never been repealed or modified, unless the ordinance of October, 1918, set out as "Exhibit B" to plaintiff's Bill of Complaint, had the effect of modifying it.

On June 24th, 1907, the City of San Antonio enacted an ordinance requiring street railways in said City to transport and carry free of charge all persons serving in the Police and Fire Departments, while on duty and in uniform,

or provided with written authority by the City Marshall or the Chief of the Fire Department. Said ordinance provided for penalties. A true copy of same is attached to Plaintiff's Original Bill of Complaint and Marked "Exhibit S".

The Plaintiff and its predecessor, the San Antonio Traction Company, have both complied with said ordinance since the passage thereof.

Prior to April 4, 1900, the San Antonio Traction Company was incorporated under the laws of the State of Texas, for the purpose of owning, constructing and operating a street railway system in San Antonio, and upon that date became the owner of all the rights, privileges and franchises of the San Antonio Street Railway Company and the San Antonio Edison Company, and thereafter, up to the time the San Antonio Public Service Company became the owner, owned and operated a street railway system in said City under and by virtue of said rights and franchises. On or about July 1, 1917, the plaintiff, the San Antonio Public Service Company, complainant in this case, was incorporated under the laws of the State of Texas.

During the month of July, 1917, the San Antonio Traction Company and the San Antonio Gas & Electric Company filed their petition with the City of San Antonio, praying that the city grant them the right to assign to the San Antonio Public Service Company all of the rights, privileges and franchises of any and every nature enjoyed by the Traction Company and the Electric Company. By ordinance of July 10, 1917, a true copy of which is attached to respondent's plea to the jurisdiction and motion to dismiss, marked "Exhibit A", the City of San Antonio granted said prayer, but provided by said ordinance evidencing said grant that all the limitations, duties, contracts, forfeitures and obligations imposed on or required of either of said companies at that time should be imposed on and required

of plaintiff and provided further that the ordinance should not take effect until plaintiff should accept all the provisions and limitations of the ordinance within ninety days after the final passage of same. The Complainant, the San Antonio Public Service Company, duly accepted said ordinance upon the terms and subject to the limitations therein set out, a true copy of such acceptance is attached to Respondent's Plea to Jurisdiction and Motion to Dismiss, and thereupon became and is still the owner of all the rights, privileges and franchises theretofore owned and enjoyed by said San Antonio Traction Company and said San Antonio Gas & Electric Company.

At that time the City Charter gave the Commissioners power under Section 95: "To exclusively control and regulate everything connected with street railways and to make such rules and regulations for the same as the Commissioners may deem necessary."

Prior to March 16, 1899, there was enacted a city ordinance in effect requiring street railway companies within the City of San Antonio to transport passengers for a five cent fare with transfers to other lines of the same company; a true copy of this ordinance it attached to plaintiff's First Amendment to its Original Bill filed July 26, 1919, marked "Exhibit D". This ordinance has never been repealed and was in force on March 16, 1899, and also on July 1, 1917, and remained in force until October 3, 1918.

The San Antonio Traction Company was in July, 1917, transporting adult passengers within the city limits of the City of San Antonio for a fare of five cents and giving universal transfer, and was carrying the persons designated in the State Half Fare Law for half fare and children under five years of age free when attended by a person above five years of age, all as required by aforesaid statute and ordinance, and no question was raised or complaint made with regard to this rate of fare by said Traction Company

or the San Antonio Public Service Company at the time that the application was made for the right to consolidate the franchise of the Gas and Electric Company and the Traction Company by assigning same to the Public Service Company, or at the time said petition was granted or accepted.

Prior to the time when petition was made by the Gas and Electric Company and the Traction Company to transfer their franchises to the San Antonio Public Service Company, the City of San Antonio had amended its charter, to-wit, in 1914, as provided for by what is commonly known as the Home Rule Amendment of the Constitution of the State of Texas, authorizing cities and towns over 5000 people to adopt, alter or amend their own charter by public election, and this charter contained the same provisions with reference to the regulation and control of street railways as hereinbefore set out.

On March 28, 1918, the City of San Antonio passed an ordinance forbidding any public service company, enjoying any public franchise or privilege in the City of San Antonio, changing or raising its rates without first filing application with the Mayor or Commissioners and obtaining permission, and denouncing certain penalties for the violation of said ordinance; a true copy of said ordinance marked "Exhibit A", is attached to Complainant's Bill of Complaint.

On August 29, 1918, Complainant, the San Antonio Public Service Company, filed a petition with the City of San Antonio alleging that the price of labor, materials and the burden of taxation had been greatly increased since the war and that by reason of the increased cost of maintenance and operation, the traction department of plaintiff could not earn enough to make the expenses of maintenance and operation and a reasonable return on its investment, and prayed that the rate of fare should be fixed

by the City at present at six cents with universal transfers inside the City limits, or that the rate of fare be fixed at five cents to and from the center of the city to any point on the car lines inside the city limits, and that transfers and crosstown lines routing on a five cent fare be eliminated. This petition was denied by the City by ordinance passed during the month of October, 1918, a true copy of which is attached to Complainant's Original Bill of Complaint, and marked "Exhibit B". After the denial of this petition motion for rehearing was filed before the Mayor and Commissioners and this was also denied, and suit was then instituted in the present case. On said hearings before the City Commissioners, plaintiff introduced in effect the same evidence as was introduced in this trial and no evidence was offered by the City.

Complainant, the San Antonio Public Service Company, furnishes gas and electricity and street car service to the citizens of San Antonio and people residing in the suburbs adjacent to the City.

A detailed statement of the result of operations for all of the years beginning with 1902, in the Traction Department occurs on page 51 of the Master's report.

There was no evidence introduced either pro or con with regard to the operating expenses and revenues of the gas and electric department. For the years 1918 and 1919 the net operating revenue found by the Master on the reasonable value of the property as found by him within the city limits were 4.36% for the year 1918 and 3.88% for the year 1919. That during the year 1919 and probably for several years the company will not, at the present fare earn the rate of return upon the value of its property found by the Master to be reasonable. (R. 118).

The various provisions of the Charter in effect in 1899 and 1917 other than those hereinbefore set out, having been agreed upon by the parties, will be set out and re-

ferred to in the argument but we deem it unnecessary to mention them further here.

This case has been brought to this Court by appeal, the jurisdiction of the District Court being challenged and the construction and application of the Constitution of the United States being involved.

Appellant filed the following specifications of error:

SPECIFICATIONS OF ERROR.

1. The Court erred in holding that it had jurisdiction in this case.

2. The Court erred in over-ruling the Defendant's plea to the jurisdiction and motion to dismiss.

3. The Court erred in holding that the franchise ordinance of 1899 and the consolidation ordinance of 1917 did not constitute a binding contract and agreement precluding the Complainants from maintaining this action.

4. The Court erred in taking jurisdiction in this case and in refusing to dismiss same on motion, because complainant's petition showed upon its face that it was attempting to enjoin the City from demanding the compliance by Complainant with its own contract, voluntarily entered into, and accordingly there was no taking of property without due process of law, and the bill is without merit or equity, and the court without jurisdiction.

5. The Court erred in issuing the writ in this case, because the undisputed evidence shows that the Complainant the San Antonio Public Service Company was endeavoring to avoid by an injunction compliance with the contract made by it and its ancestor in right, the San Antonio Traction Company.

6. The Court erred in issuing the writ herein because, even should it be held that the franchise ordinance of 1899 and the consolidation ordinance of 1917 did not constitute a contract, said ordinance contained provisions with regard to the rate of fare, which at least constituted limitations and conditions annexed to the grant, which, the City, having under its charter the exclusive control over its streets, had the right to annex and which Complainant could not repudiate at the same time asserting its other rights based upon the same grant.

7. The Court erred in issuing the writ because even if it be held that the franchise provision and agreement for a five cent fare, with transfers was abrogated or invalidated by the State Half Fare Law, still the Complainant, the San Antonio Public Service Company, ratified, confirmed and re-accepted such provision and all existing conditions by applying for and accepting the Consolidation Ordinance of July, 1917.

8. The Court erred in issuing the writ and holding that the City had no power to make a contract for rate of fare, because even should it be held that such was the case under the law as it existed in 1899, the same was not true in 1917, when the San Antonio Public Service Company applied for additional privileges and was granted same.

9. The Court erred in failing and refusing to confirm the Master's report.

10. The Court erred in overruling the Master and disaffirming his report in so far as he held that the Court was without power to issue the writ under the facts existing in this case and recommended that the Court dismiss the case.

11. The Court erred in disaffirming the report of the Master in issuing the writ, because under the facts as found

by the Master the Court was without jurisdiction in the case and could not grant the relief prayed for.

12. The Court erred in granting a writ in this case, because in July, 1917, when the Complainant, the San Antonio Public Service Company, succeeded to the franchise of the Traction Company and the Gas and Electric Company, it entered into a contract with the City of San Antonio, whereby it renewed the original agreement of its predecessor for a five-cent fare, with universal transfer, and further agreed to be bound by all of the limitations, duties, contracts, forfeitures and obligations imposed on or required of its predecessor at that time. At that time the City of San Antonio had amended its charter under the Home Rule Amendment to the Texas Constitution, and was a self-governing and independent municipality and did not derive its authority or powers from the Texas Legislature. It accordingly had the unquestioned authority to make this contract and agreement, and both it and the Complainants were bound by same.

13. The Court erred in granting the writ of injunction in this case, because under all of the facts of the case as shown by the exhibits to the pleadings and evidence before the court on the motion to dismiss, and evidence before the Master, Complainant was not entitled in equity to the relief prayed for. (R-125).

ARGUMENT.

Appellants contend in this case:

FIRST: That the Court was without jurisdiction, which fact was apparent upon the face of the bill, same clearly showing that the Company was attempting by injunction to escape complying with its valid contract for a five-cents fare (5c) with transfer; that accordingly there was no

taking of its property without due process which was the only Federal question attempted to be raised.

SECOND: The Court erred in retaining jurisdiction after hearing the plea and motion to dismiss because the uncontroverted evidence showed (a) a valid contract granted by the franchise ordinance of 1899, and consolidation ordinance of 1917, (b) a valid condition and limitation annexed on and to the franchise grant providing for a five-cents (5c) fare with universal transfer.

THIRD: If it be held that the Court had jurisdiction, still the Court erred in issuing the writ upon final hearing upon the ground that plaintiff was being deprived of its property without due process for the reason the uncontroverted evidence showed that the plaintiff had bound itself by a valid contract agreeing to the rate of fare which it sought to enjoin.

FOURTH: The Court erred in ruling that the provisions in the franchise ordinance of 1899 for a five-cents (5c) fare did not constitute a contract and that if it did the city was without power to make same for the reason that even should it be held that the city was so disabled in 1899 that disability would not exist in 1917, when plaintiff applied for, received and accepted the consolidation ordinance, the Home Rule Amendment to the Constitution of the State of Texas, having in the meantime been passed, and Section 17, Bill of Rights no longer having application to the City of San Antonio.

FIFTH: The Court erred in issuing the writ because even should it be held that the franchise ordinance of 1899 and the consolidation ordinance of 1917 did not constitute a contract the ordinances contained provisions with regard to rate of fare which at least constituted limitations and conditions annexed to the grant which the city under its

charter having exclusive control of its streets had the right to annex under the settled decisions of the Court of last resort of the State of Texas, and Complainant could not repudiate same and at the same time assert other rights based upon the same grant.

SIXTH: That the Court was in error in refusing to confirm the Master's report and dismiss the bill for the reason that under the facts as stated by the Master and which will be set out more fully hereafter, the Court was without jurisdiction to grant the relief prayed for.

I.

JURISDICTION OF THE FEDERAL COURT.

At the outset the defendants challenged the jurisdiction of the court by filing a plea to the jurisdiction and motion to dismiss. All of the parties to this litigation are citizens of the State of Texas, accordingly jurisdiction must be predicated upon some other ground than diversity of citizenship, and it is obvious that the only ground relied upon is the deprivation of property without due process of law. Defendants, as such, asserted in the Court below and, as appellants, assert here that such question does not arise in the case.

The facts involved have been fully set out under the statement of the nature and result of the case and it is, of course unnecessary to do more than refer to them in the course of this argument.

The plaintiff, Company's predecessor, applied for and in 1899 accepted a forty (40) year franchise entitling them among other things to operate a street railway in the City of San Antonio which franchise contained the provision that they should charge a five-cent (5c) fare with universal transfer. In 1917, this franchise having passed into the hands of the San Antonio Traction Company, and the San

Antonio Gas and Electric Company, they made application to transfer same to the plaintiff in this case, San Antonio Public Service Company. This application was granted by the City with the provision that all the "limitations, duties, contracts, forfeitures and obligations imposed on or required of either of said companies at this time shall be imposed on and required of the San Antonio Public Service Company." This 1917 ordinance in common with the franchise ordinance of 1899 contained a provision that it should not be effective until accepted in writing by the grantee. The written acceptance in each instance was filed. The appellants contend that these ordinances constituted a contract between the City and the San Antonio Public Service Company and this contract is shown upon the face of the bill. The question as to whether a contract in fact existed and the authority of the city to make it will be more fully discussed in the argument as to the action of the court upon the merits of the case, but it is probably appropriate here to cite some of the reasons and authorities for our position at this time.

The City Charter in effect in 1899, Sec. 1, Art. 4, gave to the City "the right to make contracts." Section 99, "to direct and control the laying and construction of railroad tracks within the city," etc. Section 100, "exclusively to control and regulate everything connected with the city railroads," etc. Section 103, "the right to pass all ordinances not contrary to the Constitution, necessary for the good government of the city or carry into effect the powers vested therein," etc.

The Constitution of the State of Texas, Article 10, Section 7, forbade the Legislature granting the right to construct or operate a street railroad within any city without first having acquired the consent of the local authorities.

In 1912 the Constitution of the State was amended so as to provide that cities having more than five thousand (5000) inhabitants might adopt their own charters, provided that no charter should contain any provision inconsistent with the Constitution or general laws of the State.

These various provisions will be more fully set out later. There was no inhibition in the City Charter, the laws of the State or the Constitution of the State against making a contract of this kind, and on the contrary the right and authority to contract in this way clearly resided in the city as evidenced by the decisions of the Courts of Texas which we will hereafter cite to this Court. The only possible objection that might be urged against the right to make this contract was the provision contained in Article 17 of the Bill of Rights, Constitution of the State of Texas, to the effect that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof." This provision does not forbid the making of a contract, and it will be noted that the same when made is binding not only upon the company, but upon the city, and under the construction placed upon the article by the Supreme Court of Texas, the grant was simply rendered subject to future regulation or control by the Legislature of the State,

Mayor et al, vs. Houston Street Railway, 83 Texas, 548.

On the motion to dismiss for want of jurisdiction, the evidence showed as stated, that in 1917 the franchise was assigned with consent of the city, to the complainant, Public Service Company, and it agreed to be bound by all the limitations, duties, contracts, etc., imposed on or required of its predecessors at that time. When this agree-

ment was made the Constitution of the State had been amended by the passage of what is known as the Home Rule Amendment granting to cities of over five thousand (5000) people, the right of local self government. This amendment was passed in 1912 and the City of San Antonio came under it by reason of the fact it had amended its charter in compliance therewith, and accordingly it derived its authority and powers not from the Legislature but from the sovereign. XYDIAS AMUSEMENT CO. VS. CITY OF HOUSTON, 185 S. W., 415. Could it be held that Section 17 of the Bill of Rights placed the city under any disability in 1899 to make a contract of this character, that disability had certainly been removed in 1917 for the reason that the inhibition contained in Section 17, of the Bill of Rights is against the Legislature or governmental agency acting under its authority, and not against a "home rule city."

When the complainant company accepted the consolidation ordinance of 1917 its predecessor was complying with the franchise agreement for a five cents (5c) fare with universal transfer, there was a city ordinance as shown by the Statement of Evidence requiring the carriage of passengers for a five cents (5c) fare with transfer, the State Half Fare Law was in existence and its validity save in case of confiscation had been settled by the Altgelt case. These were, each and all of them, requirements and obligations imposed on and required of Complainant's predecessors at that time. The San Antonio Public Service Company accepted this ordinance in writing and without reserve. It seems clear to appellants that even should it be held that a binding contract had not been made in 1899, which fact is not admitted, but denied, still unquestionably such a contract was effected by the consolidation ordinance of 1917.

That the cities of the State of Texas had authority to enter into a franchise contract of this character and that

these franchises, which were accepted by the grantees in writing, constituted contracts, is amply shown by the decision of the Courts of last resort in this State.

Athens Telephone Co. vs. City of Athens, 182 S. W., 42, writ refused by Supreme Court.

City of Terrell vs. Terrell Electric Light Co., 187 S. W., 966,

Texarkana Gas & Electric Co. vs. City of Texarkana, 123 S. W., 213,

Mayor et al, vs. Houston Railway, 83 Texas, 548,

Rio Grande Railroad vs. Brownsville, 45 Texas, 88.

If appellants be correct in their contention that a valid contract was made either by the franchise ordinance of 1899 or the consolidation ordinance of 1917 and that contracts of this character were recognised and enforced by the Courts of last resort of this State, there was no taking of complainant's property without due process of law and accordingly there was no Federal question in the case.

In the case of DEFIANCE WATER COMPANY VS. DEFIANCE, 191 U. S., 192, 48 Law Edition 140, this Court said:

> "We have repeatedly held that when a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution, or some law or treaty of the United States, before jurisdiction can be maintained on this ground."

Following this general statement of the law this Court held that the assertion in the bill filed by the Water Company against the municipality, that the obligation of the municipality's rental contract with the Company was impaired by an ordinance which denied the validity of the contract was too clearly unfounded to present a case of which the Federal Court had jurisdiction, the ordinance itself showing that it did not in fact constitute such an impairment of the contract.

In the NEWBURYPORT WATER COMPANY vs. CITY OF NEWBURYPORT, 193 U. S., 562, 48 Law Edition, 796, this Court speaking through the present Chief Justice said:

> "At the threshold we are met with the objection raised below and urged at bar, that the circuit court was without jurisdiction, because the bill on its face did not state a case arising under the Constitution or laws of the United States, within the intendment of the act of August 13, 1888, 25 Stat. at L. 44, Chap. 866 (U. S. Comp. Stat, 1901, p. 508). As the case is here on direct appeal from the decree of the Circuit Court of the United States, the solution of this question necessarily involves also deciding whether the case was properly brought to this court. As the existence of the constitutional question is the only basis of the right to the direct appeal, if there was no such question in the court below there was and is no such issue by which the direct appeal to this court can be sustained. Under these circumstances, if the contention as to want of jurisdiction of the court below, arising from the alleged absence of constitutional questions, be well founded, our duty is not simply to dismiss the appeal, but to reverse the decree below, with instructions to the circuit court to dismiss the bill for want of jurisdiction. Defiance Water Co. vs. Defiance 191 U. S., 184, ante. 140, 24 Sup. Ct. Rep., 63.

> "If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions, there was, of course, jurisdiction. But that is not the sole criterion. On the contrary, it is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial, but is without color or merit."

and following this statement of the law the Court held that an averment in a bill that the property of the Water Company was taken without due process of law by a Massachusetts statute because of the construction put upon such statute by the highest court of the State, was insufficient to sustain the jurisdiction of the Federal Court, where it was shown upon the face of the bill and such statute that the statute did not so operate. In this case, the Water Company having voluntarily accepted the provisions of the statute and conveyed its property thereunder was disappointed by the construction put upon the statute by the Supreme Court of the State and attempted to assail its constitutionality.

To the same effect is the case of McCAIN vs. DES MOINES 174 U. S., 167.

In the case of ENNIS WATERWORKS CO. vs. CITY OF ENNIS, 233 U. S., 651, 58 Law Edition, 1139, Writ of Error was sued out to final judgment of the Supreme Court of Texas. The jurisdiction of the Supreme Court was challenged upon three grounds, the third of which was as follows:

> "That even if it be the duty of this court to determine for itself whether the state court rightly concluded that there was originally, no contract, nevertheless there is no jurisdiction in this case because the court below, in deciding that there was

originally no contract, based its action upon a rule of state law which had been so conclusively determined at the time the alleged ordinance relied on as a contract was adopted, that the assertion that there is a contract right is of so frivolous and unsubstantial a character as to afford no basis for jurisdiction."

Speaking of this the Court says: "The face of the record so clearly manifests the correctness of the third proposition that we pass at once to its consideration." It then held that the law of the State of Texas having been so thoroughly settled to the effect that the contract relied upon was void that no Federal question with regard to its impairment arose and accordingly the Supreme Court was without jurisdiction. Quoting the court: "In other words that where we come to consider a contract arising from a State law or ordinance we will treat it as if there was embodied in their text the settled rule of law which existed in the State at the time the State action relied upon as a contract was taken."

While this case involves a question of the jurisdiction of the Supreme Court upon writ of error still the principal argued is analogous to the one at bar. As we understand these decisions of this Court if the bill upon its face showed there was no substantial controversy arising under the Constitution or laws of the United States the lower court was without jurisdiction. If the bill showed that there was no taking of property without due process of law but that complainant was endeavoring by injunction to avoid a compliance with its own voluntary valid agreements, the Court should take notice of that fact and not entertain jurisdiction of the case, despite the fact that the bill was replete with allegations to the effect that the complainant's constitutional rights had been invaded.

If appellants be correct in their contention in this case the lower court was without jurisdiction and it will be the duty of this Court under the decision in Defiance case and Newburyport case, to reverse the case with instructions to dismiss. The question as to the jurisdiction of the court hinges necessarily upon the existence of the contract and the right to make same and that proposition will be more fully commented on under the succeeding subheads.

II.

IF IT BE HELD THAT THE COURT HAD JURISDICTION STILL IT ERRED IN GRANTING THE WRIT FOR THE REASON THAT THE PETITIONER WAS BOUND BY THE FRANCHISE ORDINANCE OF 1899 AND THE CONSOLIDATION ORDINANCE OF 1917, BOTH OF WHICH CONSTITUTED VALID AND BINDING CONTRACTS.

The District Court in granting the writ of injunction went further in the two written opinions handed down than either the Court of Civil Appeals of the State of Texas, or this Court was willing to go in the Altgelt case.

FIRST: The District Court holds that the franchise ordinance of 1899 and the Consolidation ordinance of 1917 in so far as they apply to rates were not contracts but simply regulations.

SECOND: That if considered as contracts the city was without power to make same.

Let us briefly consider both these propositions:

FIRST: With regard to the Court's statement that the two ordinances accepted as they were by the Public Service Company and its predecessors do not constitute contracts. This Court in the Alegelt case declined to pass on the question of contract pro tanto but contented itself by holding

that even though the ordinance of 1899 be considered as a contract that it was still subject to regulation by the State Legislature. The decided intimation of that opinion, however, if we may be permitted to draw conclusions from the language used, is that the Court considered the franchise ordinance as a contract, but one subject to future regulation and control by the Legislature, for the Court says:

> "Assuming, but not deciding, that the ordinance of March 16, 1899, extending the franchise of the San Antonio Street Railway, and imposing certain limitations, constituted a contract pro tanto, the question still remains whether the provision 'that said street railway companies shall charge 5 cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other,' constituted a contract with respect to which no further legislation upon that subject could be enacted without impairing its obligation. Even if construed as a contract, it was still subject to the provisions of the Constitution of 1876, which in 17 of the Bill of Rights, declared that no irrevocable or uncontrollable grant of special privileges or immunities should be made; but that all privileges granted by the Legislature or created under its authority shall be subject to the control thereof." San Antonio Traction Co. vs. Altgelt, 200 U. S. Supreme Court Reports 494.

The Court further holds in the latter part of the opinion that even the State Legislature could not reduce the rate in such a manner as to make it confiscatory.

The Court of Civil Appeals in the same case declined to hold that the franchise of 1899 was not a contract and based its decision purely upon Section 17, Bill of Rights.

That it should be treated as a contract is plain to our minds when its form and the facts in connection with it are considered.

FIRST: The City is given in Article 1, Section 4, of the Charter in effect at that time, the power "To make all contracts, and to do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate administrative powers."

SECOND: By Section 100 of the Charter it is given power "exclusively to prevent control and regulate everything connected with city railroads and make such rules and regulations for the same as the City Council may deem necessary."

Even the District Court admits that this provision is broad enough to authorize the contract unless restricted by Section 17 of the Bill of Rights, for it says in its opinion: "The power to regulate everything connected with street railroads, thus unrestricted would include authority to contract for and fix rates were it not for the bar imposed by Section 17."

THIRD: Section 7, of Article 10 of the Constitution of the State of Texas, provides:

> "No law shall be passed by the Legislature granting the right to construct and operate a street railroad within any city, town or village, or upon any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad."

FOURTH: The franchise ordinance itself contains a provision for written acceptance by the grantee which written acceptance the records show was filed.

FIFTH: Throughout the entire ordinance constantly occur expressions of this character:

> "Said San Antonio Street Railway Company' shall after their acceptance of the extension hereby granted, pave," etc.

"The said Mutual Electric Light Company agrees to furnish the City of San Antonio and the City agrees to take for five years," etc.

"City reserves the right to renew this contract for ten (10) years after the expiration of this contract."

That the cities of Texas can and do contract with regard to matters of this kind by franchise ordinances is too well settled to admit of controversy.

Mayor et al, vs. Houston Railway, 83 Texas, 548.

Rio Grande Railway vs. Brownsville, 45 Tex., 88.

Athens Telephone Co. vs. City of Athens, 182 S. W., 42.

Texarkana Gas & Electric Co. vs. City of Texarkana, 123 S. W., 213.

City of Terrell vs. Terrell Electric Light Co., 187 S. W., 966.

Galveston & Western Railway Co. vs. Galveston, 90 Tex., 398.

In none of these cases was the franchise agreement construed as a mere regulation but on the contrary same was treated as a vested right, contractual in its nature, subject only to the Legislature as provided for in Section 17 of the Bill of Rights.

The Court will bear in mind that at this stage we are simply discussing the question as to whether the franchise ordinance constituted a contract. The question of the power of the city to make it will be discussed later. The form of the ordinance itself is contractual. Words of agreement are used as shown above, and provision is made for a written acceptance by the grantee, which clearly indicates that there was to be a meeting of the minds, and an agreement on the part of the parties and not a mere regulation. Importance has been attached by this Court to the fact that

a written acceptance of ordinances was required thereby constituting contracts. In the Detroit case, 184 U. S. 366, 46 Law Edition, 592, the Court said:

> "The rate of fare is among the most material and important of the terms and conditions which might be imposed by the city in exchange for its consent to the laying of railroad tracks and the running of cars thereon through its streets. It would be a subject for grave consideration and conference between the parties, and when determined by mutual agreement, the rate would naturally be regarded as fixed until another rate was adopted by a like agreement."
>
> "Ordinances of a like nature were passed by the common council relating to the other companies, and all of them were accepted in writing. * * * Coming to a consideration of the effect of the language used we think it amounted to a contract as to rates of fare."

and in the CLEVELAND case, 194 U. S. 534, 48 Law Edition, 1108, the Court says:

> "The acceptance of this ordinance by the railroad companies affected thereby was required to be in writing, and filed with the city."
>
> "In reason, the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fares were fixed in ordinances for a stated time and no reservation was made of a right to alter; that by those ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, *and the fact that a written acceptance by the corporations of the ordinances was required*, we can see no escape from the conclusion

that the ordinances were intended to be agreements binding upon both parties, definitely fixing the rates of fare which might be thereafter charged."

In view of these authorities and these facts it is difficult to understand why the Court should hold that this franchise provision was intended simply as a regulation. The reports of Texas as shown by the authorities cited above are replete with instances in which the Courts of last resort have held that franchise agreements of this character constitute contracts and are entitled to protection as such. The District Court in his memorandum opinion says that the ordinance speaks in words of command but not of contract and bases this upon what he says is the decision of this Court in the LOS ANGELES case, 211 U. S., referring to an ordinance of like terms and effect. In that statement the District Court is in error as this court in Los Angeles case was not speaking at that time of the ordinance but was speaking of the City Charter as the text of the case will plainly show. We most earnestly submit to the Court that the franchise ordinance of 1899 was contractual in its nature and constituted a contract under the decision of this Court and the Courts of the State of Texas.

Now to consider the second proposition that admitting the franchise agreement to be a contract the city was without authority to make it. We are not at this juncture discussing the effect of the passage of the Home Rule Amendment and the adoption by the City of San Antonio of its charter thereunder, but confine this argument for the time being to the effect of the 1899 franchise.

The Company itself was under no disability in the premises and no contention of that kind is made. The City of San Antonio in 1899 had as shown before in this argument: "Power under its charter to contract; exclusively to prevent control and regulate everything connected with the

city railroads, etc.; to direct and control the laying and construction of railroad tracks within the city, and to pass all ordinances necessary for the order of good government of the city or the trade, commerce or health thereof." Section 7 of Article 10 of the State Constitution provides that even the Legislature could not grant the right to construct and operate a street railway within any city without first acquiring the consent of local authorities. As above stated the District Court conceded that the authority of Section 100 of the Charter was sufficient to enable the city to make this contract unless limited. He bases his decision that the city was without power to make the contract solely and entirely on Section 17 of the Bill of Rights of the State of Texas, for he says; "The city in the present case fails to show that it had legislative authority to make the contract it alleges was made with the company because the inhibition of the Constitution of 1876 against irrevocable or uncontrollable grants of special privileges or immunities stands squarely in the way."

The most that can be said of this provision is that any grant made by the Legislature or under its authority of the character there mentioned shall be subject to its control. The parties contracting were charged with notice of the fact that the contract was subject to the future regulation and control by the Legislature (not the city) but subject to that limitation they were at liberty to contract as they saw fit. This was the construction put on the article by the Court of Civil Appeals in the Altgelt case, it was the construction put upon it by this Court in that case, and this Court went out of its way to remark that even the Legislature could not so regulate and control the matter as to confiscate the property of the parties. It was the construction placed upon this article of the constitution by the Supreme Court of Texas in the HOUSTON RAILWAY case, 83 Texas, 548.

It is obvious from the decisions cited that it was not the intention of the framers of the Constitution to take from cities the right to contract with regard to these matters. The most that can be contended for it is that the contracts were subject to be regulated and controlled by the Legislature. If this were not true why have the various Courts of Texas enforced these franchise provisions in the numbers of cases which we have cited to this Court?

In the HOUSTON case, 83 Texas, an injunction was brought by the Houston Street Railway Company to enjoin the city from interfering with it in laying a street railway track. The city defended upon the ground that it had no authority from the Legislature to grant the franchise. The franchise itself gave to the Company the right to go upon the streets and provided that its use of the streets after the passage of the ordinance should be deemed as an acceptance of the grant. The Charter from the State to the Company gave it the right to enter into contracts with the City of Houston, and the Charter of the City of Houston contained the following provision:

> "The City Council shall have the exclusive control and regulation of all streets, alleys, public grounds, and highways within the corporate limits of the city, and to direct and control the laying and construction of railway tracks, turnouts and switches, and to require that they be constructed and laid so as to interfere as little as possible with the ordinary travel and use of the streets. To control and regulate everything concerning street railways," etc.

In discussing the matter the Supreme Court of Texas, said:

> "We are of the opinion that by the terms of both of these charters (clearly by that of the street railway company) the Legislature intended to and did

confer ample authority upon the city council to grant the franchise in question to the plaintiff. We also think, that according to the current of the authorities, the grant having been duly accepted and acted upon by appellee, became a vested right or perfect contract which could not be subsequently repealed nor impaired by the common council or the authorities of the City of Houston; provided, however, that there is no constitutional prohibition to the granting of said special privileges by the Legislature or under its authority. Railway vs. City of Brownsville, 45 Texas, 96, 2 Dill. on Mun. Corp. 3 ed., Sec. 727; 1 Ld., Sec. 314; Port of Mobile vs. Railway, 3 South Rep., 108; Railway cases, 79 Ala., 469; Milhan vs. Sharp, 27 N. Y., 611; City of Burlington vs. Street Railway, 49 Iowa, 144; Dartmouth College Case, 4 Wheat, 519; Fletcher vs. Peck, 6 Cranch, 137; Stein vs. Mayor, 49 Ala., 362; Railway vs. Anderson County, 59 Texas, 667; Const. Art. 10, Sec. 7. Those decisions, cited by counsel for the appellant, which deny the power of the city government, under its general authority over its streets, to grant the right to operate a street railway in such streets for private gain, were rendered in cases where the Legislature had not conferred upon the municipality the necessary authority to extend such franchise."

The Court then goes on and of its own motion discusses the bearing that Section 17 of the Bill of Rights might have upon this case, and in the course of the discussion it says:

"Second: But the word 'irrevocable' is frequently used in a somewhat different sense. It may mean a thing or denote a right or power which can not be annulled or vacated except for a sufficient cause. It may mean unalterable or irreversible. To revoke sometimes denotes the right to annul, rescind, or abolish. Webster. Revocation not only means the recalling of the power, but may denote "the vacating" of the grant for cause." Bouvier.

"It may be that this is the sense in which the language of the paragraph before quoted is used. The framers of the Constitution may have intended merely to prohibit the Legislature from granting any "special privilege" which could not be annulled, condemned, or vacated in the manner and for the causes as might be prescribed by law. This view of the question is strengthened by the use of the word 'uncontrollable in the same connection, and the same clause most positively declares that all 'privileges and franchises shall be subject to legislative control' and regulation. When we consider the effect and consequences of declaring that every grant of special privileges or franchises for a term of years by the State could be revoked or withdrawn at the mere pleasure or will of the Legislature, we then very much doubt that the framers of the Constitution or the people in adopting it intended to reserve to or confer such power or authority upon the Legislature. The policy of the State seems to have been to encourage the building of railways and the investment of capital in similar enterprises."

"If these special privileges or franchises in question can be recalled or terminated at the will of the Legislature, then it would follow that under the same reservation in the organic law, every charter granted since the adoption of the present Constitution to any railway, telegraph or telephone company, ice factory, gas or electric light company, etc., could be repealed or revoked at the pleasure of the Legislature, without the necessity of a judicial forfeiture. If the language of the Constitution admitted of no other construction, it would of course be the imperative duty of the courts to so interpret it, regardless of consequences. If any injustice results, 'the remedy for such injustice must be found in the action of the people themselves, through an amendment of their work when better counsels prevail.' (Cool. Const. Lim. 88). Where the construction would lead to 'monstrous and absurd conse-

quences' the same learned author concedes the right and duty of the courts to 'question and cross question closely' the clause, to discover if it will not admit of another construction more in harmony 'with the general purposes of such instruments.' And here we invoke Section 19 of the Bill of Rights, which not only protects property but also 'privileges or immunities from destruction,' except by due course of the law of the land.' While not conclusive of the question, still this provision affords some evidence of the general purpose of the Constitution, and that its authors did not intend by the declaration contained in Section 17 to announce that the continuance or duration of every privilege or immunity which might be 'created by the Legislature or under its authority,' should be entirely dependent upon its caprice or will. See also Sec. 22, Art. 4."

"With the light before us at this time, we think that the better opinion is that this particular clause of the Constitution was intended to prohibit the Legislature from granting any 'special privilege or immunity' in such way or of such character as that it could not be subsequently annulled or declared forfeited for such causes as might be defined by law or condemned in the exercise of eminent domain (Cool. Const. Lim., Secs. 341-344); and it was further intended that 'all privileges and franchises' granted by the Legislature or under its authority should at all times remain subject to legislative control and regulation."

This opinion while having been followed many times, has never been limited or reversed so far as we are able to find.

If this be true, how can it be contended that this Article of the Bill of Rights constitute an absolute bar against the making of these contracts? In order to obtain such a result the Court must read into the Article something which does

not there exist. There is nothing there which would have prevented the city and this company from contracting and there is nothing there which would have prevented both the city and the company from being bound by the contract. The Legislature unquestionably under the decision in the Altgelt case and under the decision in this Houston case had the right to regulate and control the grant but that control did not extend to confiscation. The Complainant in this case *might now very well have good cause to enjoin the One Half Fare Law of the State as confiscatory, but it has no ground upon which to evade its own voluntary contract.*

When it entered into the contract it did so charged with notice of the fact as held by this Court that the Legislature might regulate it and control it. So long as the legislative control did not constitute a taking of its property without due process it had no grounds for complaint. When its expenses were such and its revenues were such that the reduction in its returns caused by the One-Half Fare Law constituted a taking of its property, it had just grounds to complain of that law, but it had no grounds upon which to refuse to comply with its own voluntary contract entered into with the city.

The decisions of the Courts of Texas will show that the policy of this State has been to uphold these franchise contracts. In one of the earliest cases that of the RIO GRANDE RAILWAY vs. CITY OF BROWNSVILLE, 45 Texas, 96, the Supreme Court says:

> "But in addition to this defect in the bill, it plainly appears from the statement of facts that appellee had consented to the use of its streets by appellant. This was not denied. The grounds upon which appellee relies is not that it had not given its assent to the use of its streets by appellant, but that it had subsequently withdrawn and revoked such

consent. There is nothing in the statute authorizing the authorities of the cities and towns, after agreeing with railway companies as to the point or points at which the latter may construct their roads, to withdraw from or annul such agreement at their option. That they have agreed to let the company make its own selection would not seem to alter the case. If they may revoke such consent, which however, we are not called upon to decide in this case, it should appear it was done, and notice of it given the company before any action was had or expenditure was made on the faith of the consent or agreement. But nothing of the kind is alleged in the petition, or has been shown by the evidence. On the contrary, the inference to be drawn from the bill itself, is, that appellant must have designated and surveyed its line, and had, probably, commenced work within the city limits before the repeal of the ordinance authorizing it to make its road on any street it might select, as shown by the statement of facts. If so, the repeal of the ordinance granting appellant the privilege of selecting and appropriating any of the streets and alleys of the city it chose, was clearly inoperative and void."

In GALVESTON AND WESTERN RAILWAY, TEXAS, vs. GALVESTON, 90 Texas, 407, the Supreme Court of Texas after analyzing a number of cases says:

"The result of the cases reviewed, if their correctness be conceded, is to establish the following propositions of law:

"(1) If the right of a railroad to occupy the street of a town or city be dependent solely upon the action of such town or city, the latter may, in granting its consent, prescribe terms for the breach of which the right granted may be forfeited. (State vs. Madison Street Railway, 72 Wis. 612). The power that creates a corporate right may limit its enjoyment.

"(2) When the law of the State grants permission to railroads to use the streets of towns and cities, but requires the assent of the authorities of such municipal corporation, if the town or city in giving such concent annexes thereto conditions which may operate upon breach thereof to forfeit the license granted, and if such terms are embodied in a separate contract signed by the railroad company, it will be enforced by the courts. Railway vs. Leavenworth, 1 Dillon C. C., 393; Indianola vs. Railway, cited above."

This Court will bear in mind in this case Section 7, Article 10 of the Constitution of the State of Texas, which provides that no street railway may be built upon the streets of a city without first acquiring the consent of the local authorities.

In the Indianola case, 56 Texas, 594, a Railway Company in consideration of permission given it to go over the streets of the town entered into a contract and gave bond. Later, on being sued it raised the question as to its and the city's power to make the contract. The Supreme Court of Texas, in holding them liable, said:

"It does not follow from the fact that the company might occupy with its road some of the streets and alleys of the city without compensation, that the city could not refuse to allow the use of such of its streets as would be injurious to its commerce and inconvenient to its citizens. The city authorities control the streets for the benefit and convenience of the citizens, and have no power to sell and convey the same; yet there is no principle of law that would preclude them from consenting to an easement therein, for a railroad company to use the same for a road-bed. And the use in this way of some of the streets of the city might be detrimental to its commerce and inconvenient to the citizens; hence we see no reason why these authorities might

not contract for a compensation inuring alike to all of its citizens, for submitting to such injuries and disadvantages. Surely after the company has received and is in the enjoyment of the fruits arising from such a contract, it will not be heard to complain, and assert that the city could not confer upon it the right that it had thus received and is now enjoying."

"We conclude that the consideration paid and furnished by the City of Indianola for the contract sued on is not illegal, and that the city authorities had power over the subject matter of the contract."

And in closing its opinion the Court further says:

"In the case of Dakin vs. Williams, 19 Wend, 447, Chief Justice Nelson said: "From a critical examination of all these cases, and others that might be referred to, it will be found that the business of the court in construing this clause of the agreement, as in respect to every other clause thereof, is to inquire after the meaning and intent of the parties; and when that is clearly ascertained from the terms and language used, it must be carried into effect," etc.

"Men may enter into improvident contracts when the advantage is knowingly and strikingly against them; they may also expend their property upon idle or worthless objects, or give it away, if they please, without any equivalent, in spite of the powers or interference of the court; and it is difficult to see why they may not fix for themselves by agreement in advance a measure of compensation, however extravagant it may be, for a violation of their covenant, without the intervention of a court or jury. Can it be an exception to their power to bind themselves by lawful contract? We suppose not," etc.

"If it be said that the measure is a hard one it may be replied that the defendants should not have stipulated for it, or having been thus indiscreet

> they should have sought the only exemption which was still within their power, namely, the faithful fulfillment of their agreement."

THE CASE OF TEXARKANA GAS AND ELECTRIC CO. vs. CITY OF TEXARKANA, 123 S. W., 212, is in point. The City of Texarkana passed an ordinance levying a fifty-cent (50c) license tax on telephone and electric light poles, etc. The Gas and Electric Company resisted on the grounds that they had a franchise agreement ante-dating the ordinance in which they agreed to perform certain services for the city and in which no mention was made of this license tax. The city attempted to justify on the police power, and contended that the governmental right to regulate and license could not be contracted or bargained away. The lower court gave judgment for the city. The Court of Civil Appeals reversed and rendered the case and in so doing held:

> "It must be conceded that the provisions of this ordinance, including the levy of the license fee, fall within the usual police powers of a municipal corporation having the right to regulate and control the use and occupancy of its highways by persons engaged in conducting public utilities, such as that of the appellant, for private gain. But it does not follow from this that the exercise of some part of this police power may not under certain conditions be resisted upon the ground that it is an attempt to violate a vested right. The state, as the trustee for its citizens, is the ultimate holder and owner of a paramount authority to govern and regulate the use and occupancy of the public highways of the country. Municipal corporations succeed to this authority by virtue of the grants contained in their charters. (3 Abbott, Municipal Corp. 913). When thus empowered, cities have the authority to grant to private parties the privilege of permanently occupying and using certain portions of their high-

ways for the purpose of carrying on a business or enterprise furnishing some public service. In granting the right, or franchise as it is called, the city can impose conditions or charge a fee for the privilege given, which the applicant can accept or reject at his pleasure; but, having accepted it, he takes the franchise subject to the conditions imposed, and must pay the consideration exacted. (3 Abbott, Municipal Corp., 908). For without the consent of the municipality no one has any right to permanently use or occupy any portion of the public highways to the exclusion of others. The privilege is granted presumptively for the benefit of the public in securing the use of some agency of general utility; and when a consideration is received in return, it inures to the benefit of the community by going into the public treasury. It can therefore be readily seen that such transactions have many of the elements of a contract. The concession cannot be regarded otherwise than as a valuable property right the revocation of which after acceptance might entail serious damage."

"If the original franchise relied upon in this case was one which the City of Texarkana had the authority in the first instance to grant, one which public policy did not prohibit, it was a concession entitled to the protection generally accorded to vested rights secured by contracts. New York, Lake Erie & Western R. R. Co. vs. Commonwealth of Pennsylvania, 153 U. S. 628, 14 Sup. Ct., 952, 38 L. Ed. 846; City of St. L. vs. W. U. Tel. Co., 148 U. S. 93, 13 Sup. Ct. 485, 37 L. Ed., 380; Louisville Trust Co. vs. City of Cin., 76 Fed., 296, 22 C. A., 334, 3 Abbott, Municipal Corp., 297; Mayor vs. Houston Ry. Co., 83 Tex., 555, 19 S. W., 127, 49 Am. St. Rep., 679; Jumbo Cattle Co. vs. Bacon 79 Tex., 12, 14 S. W., 840, City of Detroit vs. Detroit R. Co., 184 U. S., 378, 22 Sup. Ct., 410, 46 L. Ed., 607; City Ry. Co. vs. Citizens' St. Ry. Co., 166 U. S.,

558, 17 Sup. Ct., 653, 41 L. Ed., 1114; 2 Abbott, Municipal Corp, 896, 919, and cases cited."

The Court continuing holds that to refuse to protect the franchise rights would amount to practical confiscation, that the relation was contractual and the right vested

> "To permit the exercise of such authority would sanction the enactment of a measure violative of contractual obligations."

We deem it unnecessary at this time to discuss the various other Texas cases cited but will refer to them under a later proposition. The ATHENS case, 182 S. W., 42, is particularly pertinent.

Appellants therefore assert:

FIRST: That the franchise ordinance of 1899 constituted a contract, and

SECOND: That the City had the authority to make same. If these premises be correct then the rule laid down by this Court in the Columbus case and the other cases here now cited, applies.

Columbus Railway etc. vs. Columbus, 249 U. S., 398; 63 Law, Ed., 669.

Knoxville Water Co., vs. Knoxville, 189 U. S., 437.

Cleveland vs. Cleveland City R. Co., 194 U. S., 517; 48 Law, Ed., 1102.

Home Co. vs. Los Angeles, 211 U. S., 274; 53 Law Ed., 176.

Vicksburg vs. Vicksburg Waterworks Co., 206 U. S., 496; 51 Law Ed., 1155.

Detroit vs. Detroit St. Ry., 184 U. S., 368; 46 Law Ed., 592.

Potter vs. Calumet et al, 158 Fed., 521.

Gas & Electric Co., et al, vs. Manhattan et al, 253 Fed., 453.

Moorhead vs. Union Light Co., 255 Fed., 920.
Michigan Ry. Co. vs. Lansing, 260 Fed., 322.
Rochester vs. Ross, 109 N. Y., Supp., 381.
Public Service Co. vs. Westchester, 99 N. E., 536, 206 N. Y., 209.
People vs. Suburban Ry. Co., 178 Ill., 594, 49 L. R. A., 650.

III.

SHOULD IT BE HELD THAT THE CITY WAS WITHOUT AUTHORITY TO MAKE THE FRANCHISE CONTRACT OF 1899 FOR A FIVE CENT (5c) FARE, STILL THE CITY WAS UNDER NO SUCH DISABILITY in 1917 WHEN THE CONSOLIDATION ORDINANCE WAS GRANTED BECAUSE OF THE FACT THAT IT HAD BECOME A HOME RULE CITY UNDER THE AMENDMENT PASSED IN 1912 TO THE CONSTITUTION OF THE STATE OF TEXAS.

Should this Court hold as the District Court did that Section 17 of the Bill of Rights constituted a bar to the making of the contract attempted to be made in 1899, appellants submit that this disability was removed by the passage of the Home Rule Amendment to the Constitution of the State of exas, in 1912. Article 11 of the Constitution of Texas was amended by passage of Section 5, among others which reads in part as follows:

> "Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the constitution of the

State, or of the general laws enacted by the Legislature of this State."

After the passage of this amendment the Legislature of the State of Texas passed what is known as the Enabling Act, conferring upon cities adopting their charters or amendments thereunder the full power of local self government, Revised Statutes, Art. 1096 D. The record shows that the City of San Antonio, in 1914 amended its charter under the terms thereof. The City of San Antonio accordingly after 1914 became what is known in Texas, as a Home Rule City and derives its powers and authorities not from the Legislature but from the sovereign people. That this is the view taken by the Courts of Texas is shown by the decision in XYDIAS AMUSEMENT CO. vs. CITY OF HOUSTON, 185 S. W., 415, in which the Court says in discussing an ordinance of the City of Houston, also a Home Rule City:

> "Since the adoption of Section 5, Art. 11, of the Constitution, supra, by the sovereign people of this State in November, 1912, the city council does not derive its power to enact such ordinances as it deems necessary to prevent immoral exhibitions within its corporate limits from the Legislature, but it derives such power directly from the sovereign people, and the only limitations placed on such power by said section is that said council shall not pass any ordinance inconsistent with the Constitution and general laws enacted by the Legislature of this State. Since the adoption of said constitutional section, there is no longer a necessity for the Legislature to confer power upon such city councils, but it may limit its powers only. In other words, the Legislature no longer delegates legislative power to such city councils."

See also STATE vs. VINCENT, 217 S. W., 402.

This being the case the Home Rule cities of Texas are not restricted by Art. 17 of the Bill of Rights for the reason that that Article upon its face applies only to the Legislature and those acting under its authority. The Home Rule cities deriving their authority not from the Legislature but from the sovereign people are accordingly not limited by the inhibition contained in that Section of the Bill of Rights, and would be at liberty to contract without regard to it.

Accordingly we find the City of San Antonio in that position when in 1917 the plaintiffs' predecessors, San Antonio Traction Company, and San Antonio Gas & Electric Company, petitioned the City of San Antonio for the right to consolidate their franchises acquired in 1899 by transferring same to the San Antonio Public Service Company. This transfer they could not make under the city charter without the consent of the city. The city granted the petition upon the condition, however, "That all the limitations, duties, contracts, forfeitures and obligations *imposed on or required of* either of said Companies *at this time*, shall be imposed on and required of the San Antonio Public Service Company." It further required a written acceptance of the ordinance, which written acceptance was filed (R-22-23-24).

The Court will note the verbiage *"Imposed on or required of at this time."*

At that time, to-wit, 1917, the San Antonio Traction Company was complying with the Franchise ordinance of 1899, by charging five cents (5c) fare with universal transfer. A city ordinance, penal in its character, was in effect making a similar requirement upon the company. The State Half-Fare Law was in effect and was being complied with by the Company. Despite the fact that this application was made and these privileges granted at the time the Company in its petition now claims it was commencing

to lose money, it raised no objection to any of these requirements or obligations and no question was raised or complaint made with regard to the rate of fare (121). This being the case appellants now most earnestly insist that the Company recontracted and rebound itself to and with the city by applying for and accepting the consolidation ordinance. Should it be conceded that the Court was right in holding that the city was without authority to make the contract of 1899, (and this is practically the sole ground upon which he based his decision), that objection most certainly could not obtain when the Company rebound itself in 1917.

IV.

THE FARE PROVISIONS IN THE ORDINANCE IN QUESTION CONSTITUTED AT THE LEAST A CONDITION OR LIMITATION ANNEXED TO THE GRANT WHICH COMPLAINANT HAVING VOLUNTARILY ACCEPTED IS ESTOPPED TO CONTEST.

This Court in the Altgelt case referred to the ordinance as "imposing certain limitations upon the exercise of their franchises, among which was that certain street railway companies shall charge five cents (5c) for one continuous ride," etc. The Court of Civil Appeals in the same case held that the ordinance of 1899 "imposed certain conditions and limitations upon the exercise of the rights of the companies, among which was that said street railway companies shall charge five cents (5c) fare for one continuous ride," etc.

The rate fixed by the ordinance was one of the conditions upon which the granting of the franchise was made. It was fixed in the interest of the inhabitants of the municipality and as a safe guard against an excessive rate which might be fixed by the Company. Rates so fixed could not

be raised by the Company without the consent of the city. It must be assumed that the ordinance would not have been passed by the city in the absence of this clause and it is equally clear that the Company regarded itself fully compensated for the burdens assumed by the granting of the privileges it secured through the ordinance.

The Courts of Texas have in a number of cases considered this matter of the annexing of conditions and limitations to franchise grants and have upheld same even in instances where it was held that the city was without authority to enter into such an agreement as an original proposition.

In the case of the City of TERRELL VS. TERRELL ELECTRIC LIGHT CO., 187 S. W., 966, the City of Terrell by ordinance granted to the Electric Light Company the right to use its streets for electric light purposes under certain conditions and the Company agreed to perform certain services for the city. The ordinance provided that it was to be agreed to by the company and this agreement was made. The Company later made arrangements to purchase its power from another company, and the city disapproving of this brought suit, attempting in substance to forfeit the franchise and terminate the company's right in the premises. The District Court decided against the city and the Court of Civil Appeals in passing on the case says:

> "The appellee Terrell Electric Light Company, as we have shown, is authorized by its charter to supply electric light, etc., to its customers by any means, which clearly would include the right to purchase current from another and distribute and sell same to its customers as proposed by the contract with Texas Power & Light Company. And while the Legislature has committed to incorporate towns and cities 'exclusive control and power over' its streets, alleys, etc. (Article 854, Vernon Sayles' Civ.

State.), and while, as a consequence the Terrell Electric Light Company, could not enter upon the streets of appellant without its consent reasonably exercised, such consent may not limit or restrict the corporate authority conferred by the State. For, the paramount right to regulate public highways being primarily in the Legislature, municipalities may not, under the grant of exclusive control, of its streets, legislative on everything connected with the subject over which they possess limited authority, such as the manner and means of conducting the business so permitted the use of the streets. Galveston & Western Ry. Co. vs. City of Galveston, 90 Tex., 398; 39 S. W., 97; 36 L. R. A., 33. *However, a limitation of the general rule stated is that if the municipality annexes to a grant to enter upon its streets a condition, although without authority to do so, and the grantee voluntarily accepts the grant with the annexed condition, it cannot afterwards refuse to be bound thereby or be heard to deny the authority to impose same. Athens Tel. Co. vs. City of Athens, 182 S. W., 42.* The rule stated was adhered to in the case cited, and was a controlling issue. Writ of error was denied by the Supreme Court."

Following this statement of the law the Court held that there was no provision of the ordinance forbidding the purchase of power by the company and that the city was bound by the franchise agreement. Decision by the District Court was affirmed.

The Athens Telephone case referred to in this opinion is one of the leading cases of the State, the writ of error having been refused by the Supreme Court. The question as to a franchise provision for rates was involved which makes the case particularly appropriate in this connection. The Athens Telephone Company was at the instance of the City of Athens enjoined by the District Court from col-

lecting a rate in excess of One Dollar and Fifty Cents ($1.50) per month for telephones. The record showed that the Company or its predecessors had sought and accepted a franchise for fifty years (50) providing for a One Dollar and Fifty cents ($1.50) rate and later it attempted to raise this rate to Two Dollars and Fifty Cents ($2.50). In passing upon the case the Court of Civil Appeals said:

> "The trial court found, and it is not denied, that Garret & Truett voluntarily agreed that the rate fixed by their agreement with the citizens of Athens should be embodied in the grant by appellees, after its incorporation under the general laws of the State. An accepted authority asserts the general rule to be that the right to fix rates for the transmission of telegraph and telephone messages is inherently in the Legislature, but that such authority may be delegated to state boards, etc., or municipalities, though it will not be recognized as reposing in the latter bodies, unless very clearly delegated, yet that—*"A municipality may * * * in granting rights and privileges to such a company, annex thereto a condition as to the rates to be charged and although the municipality may not have the power to impose such a condition upon the company against its consent, yet if the company voluntarily accepts the rights granted with the conditions annexed, it cannot afterwards contest the reasonableness of such rate, or refuse to furnish services or facilities at the rate stipulated, or deny the authority of the municipality to make such agreement.* 37 Cyc. 1630."
>
> "Many cases from many jurisdictions are cited in support of the rule so clearly announced. 182 S. W., 43.
>
> "But it is further urged, in connection with what we have just said and notwithstanding the rule cited, Garrett & Truett were not bound by the grant fixing the rate of rentals, because the agreement was not evidenced by independent or collateral agreement in that respect. This contention is based

upon the rule announced in Galveston & Western Ry. Co. vs. Galveston, 90 Texas, 398; 39 S. W., 96; 36 L. R. A., 33. In that case it was, in effect, among other things, said that, when by the law of the state a given business was permitted to use the streets of towns and cities there could not lawfully be annexed to such right by the municipalities conditions which might, upon breach, operate to forfeit the grant, unless evidenced by separate or independent contract signed by the railway, and we presume, upon consideration other than the mere right to go upon the streets as provided by law. The difference between the case cited and the one at bar is that the Galveston & Western Ry. had the right by state law, as have distance telephone companies, to go upon the streets of the city of Galveston, while local telephone companies, such as appellant, do not possess that absolute right. It may be said in passing that it was held in the same case that 'if the right of a railroad' and by analogy a local telephone business, 'to occupy the streets of a town or city by dependent solely upon the action of such town or city,' the latter may in granting its consent, prescribe terms for the breach of which the right granted may be forfeited."

This Court will therefore see the interpretation placed by the courts of last resort in Texas upon franchise agreements of this character. As said, a writ of error was denied by the Supreme Court of Texas in the case, and we call this Court's attention to the fact that this case had been decided and the writ denied when petitioner, San Antonio Public Service Company applied for, and accepted the consolidation ordinance of 1917. To the same effect is the decision of the Court of Civil Appeals in the case of Texarkana Gas and Electric Company vs. City of Texarkana which has been more fully discussed heretofore.

Many other authorities along this line might be multiplied from courts of good authority. In the ROCHESTER TELEPHONE CO. vs. ROSS, 109 N. Y. Sup., 381, the Court says:

> "Here the telephone company voluntarily entered into a contract with the city; it recognized privileges which it now uses and enjoys; and I think it is now estopped from questioning the right of the city to grant the same and repudiating that part of its agreement limiting its telephone rates, as it provided in the contract. Simons' Sons Company vs. Maryland Telephone & Telegraph Company, 99 Md., 141; 57 Atl., 193; 63 L. R. A., 727; Gaedeke vs. Staten Island Midland Railroad Company, 43 App. Div. 514; 60 N. Y. Sup., 598; Dusenbury vs. New York & C. Traction Company, 46 App. Div., 267, 272; 61 N. Y. Sup., 420."

To the same effect is the decision in Potter vs. Calumet et al, 158 Fed., 520.

In the light of this authority both from the State of Texas and out of it, it is difficult for appellant to see how appellee can be heard to attack the authority of the City of San Antonio to annex those conditions and limitations to its grant. Having asked for and accepted the grant, charged at the time with notice of the fact that it was subject to control and regulation in the future by the Legislature of the State, it is now estopped to say that the City with whom it contracted did not have the authority to make these requirements of it; having for some eighteen (18) years enjoyed the fruits of its bargain it is not entitled because of the fact that the lean years have come upon it, to repudiate same.

V.

THAT THE COURT SHOULD HAVE CONFIRMED THE MASTER'S REPORT AND DISMISSED THE BILL UPON THE GROUNDS THERE SET OUT.

The Master found that the parties agreed that the rate was reasonable as fixed and that such was in fact the case. That the Company's loss was due to the war, increased prices, increased cost of labor and jitney competition. That these were conditions for which the city was not responsible and that for the Court to enjoin the ordinance complained of amounted to a guarantee upon the part of the Court to the Complainant of a fair return regardless of whether the conditions warranted or not. By the ordinance of 1899, accepted by the Company's assignor under whom plaintiff deraigns its right to enjoy its franchise in the City of San Antonio and whose property and plant plaintiff is now using, the rate of fare now complained of by plaintiff was fixed at five cents. This rate was acquiesced in by both parties until the Legislature of this State provided for half rates for school children with the corresponding right of transfer. This regulation though increasing the burden imposed upon the Company, was acquiesced in by the Company without complaint until the year 1917. During the latter year plaintiff represented to the City Council of the City of San Antonio that its interest required and it desired the consolidation of the San Antonio Traction Company and the San Antonio Gas & Electric Company, and that the said Companies should be authorized for such consolidation to assign to plaintiff all their rights, privileges and franchises of any and every nature. The City listened to the prayer of the Company and granted the authority as prayed for, but by granting ordinance it imposed upon the grantee the duty to abide by all the limitations, duties, contracts, forfeitures and ob-

ligations imposed on or required of both said Companies. Among other limitations, duties and obligations, if not contracts, thus imposed on plaintiff was the obligation to adhere to and abide by the rates for transporting passengers then fixed by the City, as well as all other regulations to which either of the pre-existing Companies were subject. This ordinance was accepted by the new company without reservation or limitation.

At the time of the acceptance by the Company of the ordinance of 1917, adopted upon its own prayer, the Great War had been in progress for three years. There had been a radical change, at the time, in the prices of both labor and material. The conditions under which the arrangement between the parties was to be carried out, were, and had been for nearly three years past abnormal. The arrangement, therefore, entered into and approved by both parties in 1917, must be presumed to have been made, not only with reference to existing conditions, but, also, worse conditions probably to ensue in the near future. For this new recognition upon the part of the Company of its obligations to protect the public in the rate of fare and regulation then existing, the City bestowed upon the plaintiff rights which it did not before possess and which it could not exercise without the consent of the municipality. These rights plaintiff is actively asserting in this case, but considers itself free to repudiate the consideration upon which these rights must rest, i. e., its agreement to uphold the rate of fare and regulations existing at the time the rights in question were granted to it.

Less than one year after the grant of these rights plaintiff asked the City for increase in rates, and, in effect, to be relieved from the performance of the conditions expressly assumed by it less than one year previous. In demanding this change in its contractual status plaintiff omitted to offer to restore the City to its original position.

It omitted to offer to dissolve the consolidation of the constituent companies and to reconvey to them the right and franchises derived by it from them under their assignment, and, in a word, to put the parties back in the position they occupied when the consolidation ordinance was passed. Plaintiff seeks to retain all the benefits of the consolidation ordinance and to add to them new and different benefits not, presumtively at least, at that time in the contemplation of the parties.

It will be found in most, if not all, of the adjudicated cases on this point that public utility companies have been allowed successfully to complain of laws or ordinances *decreasing* rates of fare and not of laws or ordinances merely maintaining rates and regulations long in use and acquiesced in, without complaint, by both parties for long periods of time. We believe that no case can be found in which a municipality and public utility company, each acting freely and voluntarily, have agreed upon a rate of fare regulations as reasonable and binding upon both parties and in which the courts have set aside such agreement and abolished the rates and regulations agreed upon within the short period apparent in this case, or any like period. The plainest principles of equity required that the company should not be permitted to complain of any failure to realize profits which it might easily have anticipated and which it must be presumed to have anticipated under existing circumstances, and it should be held to an adherence to the arrangement agreed upon, even at a loss, pending the restoration of normal conditions and the general revival of industry and commerce. It seems to us that the Company is plainly estopped from asserting that if the rate agreed upon by it in 1917, for valuable consideration, was unreasonable the following year or the year next thereafter and that if it is impracticable to "unscramble its eggs" it should clearly show to the Court the fact of

such impracticability. The record affords us no reason for believing that it is impracticable for plaintiff to do equity by restoring or offering to restore the defendant, City, to its original condition.

By the ordinance of 1899, the franchises of the Gas & Electric Company and San Antonio Traction Company were extended for a period of forty years. Plaintiff became the owner of the franchises thus extended in 1917, and its right to enjoy and exericse the franchise was expressly granted to it by the City in the same year. No attempt has been made by the plaintiff to estimate the probable profits of its undertaking for the remainder of its franchise. The record before us apprizes us, however, that during its past existence of its predecessors the investment has been far from unprofitable. The Company has grown from small and inconsiderable beginnings to its present impressive magnitude and its value, appraised in 1900 at something near $700,000 has risen, according to plaintiff's present contention, to over $6,000,000. The installation formerly carried in unequal fragments by four separate, distinct and independent companies has been merged into and is now owned and controlled by one company with all the inevitable and incidental savings in overhead and other charges. Its trackage confined, originally, to different sections of the City, disconnected and controlled by competing and, probably, hostile interests, forms now a harmonious whole traversing all sections of the city, without competitors, and dominated by one governing body. It has no complaint to make of the treatment it has received from the people of the City and from the City Government except the refusal of the City authorities to grant its later request. On the contrary, it may safely be asserted that the Company and its predecessors have received and enjoyed the co-operation and support of the City and its people in all of its efforts to enlarge, perfect

and render profitable its undertaking. We have the right to presume that it will receive the same just and considerate treatment in the future. We have, also, the right to presume that both in 1899 and 1917, both City and Company were looking to the contractual arrangement as a whole and that as in ordinary business enterprises, they anticipated that there would be years or periods of loss, as well as periods of profit, that there would be lean years as well as fat years, and that the Companies must expect to recoup the losses of the lean years from the gains of the fat years. The parties must have contemplated, in other words, not that the Company should reap a reasonable return upon its investment each year of its corporate life, but that the investment, on the whole, should show such reasonable return upon the amount of the investment.

No single fact is more true than that the utility company has no right to an emergency rate that will maintain its normal rate of income. Re Empire Gas & E. Co. (Mass.) P. U. R. 19, 18 D., 912; Re Long Island Railway Co., S. P. S. C. (1st Dist. N. Y.) 294 P. U. R., 1918, A. 649, 654."

Public utility companies, like other corporations and individuals, must to some extent "take the lean years with the fat" and bear some loss of income in war time without flinching and without claim or right to the immediate restoration of a full return. N. Y. Commission. Re Queens Borough Gas & E. Co., P. U. R. 1918 F, 872, 881.

In COLUMBUS RY. POWER & L. Co. vs. COLUMBUS, the Court said:

> "The Company seeks now by its own action to terminate the contracts, still binding upon it by their terms, as to rates of fare to be charged, and seeks to have the aid of a court of equity by enjoining the same from any further requirement of service under them. There is no showing that the contract had become impossible of performance.

> *Nor is there any allegation establishing the fact that taking the whole term together, the contracts will be necessarily unprofitable."*

and again:

> "There is no showing in the bill that the War or the award of the War Labor Board necessarily prevented the performance of the contract. Indeed, as we have said, there is no showing and, in the nature of things, there cannot be, that the performance of the contract, taking all the years of the term together, will prove unrenumerative."

We have seen that the arrangement of 1917 between the City and plaintiff was made while abnormal conditions prevailed and the obligation to maintain existing rates of fare and regulations was assumed by the Company with knowledge of existing conditions, and notice that such conditions might in the near future become worse.

Since the enactment of the ordinance of 1917 the City had done no act and taken no steps which would render this obligation of the Company more onerous. The City neither decreased the rate of fare agreed upon nor made more stringent the regulations assented to. The position of the Company, as far as any act or omission upon the part of the City is concerned, occupies the same position it occupied when it requested and procured the enactment of the ordinance of 1917. Whatever evil has come to the Company cannot be laid at the door of the City or its inhabitants and, it appears, from the contention of plaintiff that the conditions of which it complains are due to circumstances which neither the City nor the Company can control, that is to say, the higher cost of labor and material or, if you please, the diminished purchasing power of the American dollar. Certainly the City has not caused nor

contributed to the increased price of labor or material or the diminished efficiency of the coin of the country.

If the rate of fare and regulations agreed upon in 1899 and, again in 1917, by the parties are now inadequate or impracticable, such inadequacy and impractibility are not chargeable to the municipality nor its inhabitants nor ought they be held responsible for it or be compelled to make changes in the existing arrangement or incur sacrifices in aid of the other party.

IN COLUMBUS R. POWER & LIGHT CO. vs. COLUMBUS, *supra*, the Court further said:

> "There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently became impossible, or pay damages for the non-performance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. * * * It certainly was not intended to question the principle frequently declared in decisions of this Court, that if a party charge himself with an obligation possible to be performed, he must bide by it unless performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties will not excuse performance."

Applying this principal to the facts in this case, the Supreme Court further said:

> "In the present case the terms of the contract are not doubtful. The terms for which the company was given the right to use the streets of the city was definitely stated, and the terms, including the rates of fare which the company might charge, were explicitly laid down. There is no occasion to interpret general terms in the light of the intention of the parties or the circumstances of the case."

In the recent case of MUSCATINE LIGHTING CO. vs. CITY OF MUSCATINE, 256 Fed. Rep., 929, the Court said:

"It is, of course, important that utility companies shall receive reasonable compensation for what is furnished. Upon the showing before the Court it is apparent that some of the companies cannot continue under the contract rates, because they have no source of income, except the money received for the commodity furnished, and war conditions have radically increased the cost of production, so that a rate fixed at the time a franchise was granted a few years ago may be utterly inadequate at the present time to pay even current expenses; but these are conditions which the Court cannot relieve, as has been recently held in Columbus Co. vs. City of Columbus, 253 Fed., 499, and other cases. But there are other considerations. These cases are brought upon the claim that because the rates are confiscatory, the utility companies are deprived by the state of property without the due process of law, and that they are denied the equal protection of the law.

The Courts are ever ready to enforce the provisions of the Constitution of the United States; but, in order to interfere with state or municipal legislation it must appear that there is *some affirmative act* which constitutes the 'deprivation' or the 'denial' specified in article 14. When an ordinance is passed by the City Council under authority of the State, it is an act of the State and if it deprives one of his property without due process, or denies equal protection, the act will be enjoined for the constitution is sacred and must under all circumstances, be upheld."

"But has the State, or the municipality, in these cases done any act which violates the *Constitution, except in so far as such action has been consented to by the companies?* It is fundamental that every individual constitutional right may be waived."

"A person may, by his acts or omission to act, waive a right which he may otherwise have under the provisions of a Constitution; and where such acts or omissions have intervened, a law may be sustained which otherwise might have been held invalid, if the party making the objection had not by prior acts precluded himself from being heard in opposition. Thus a person who has participated in proceedings under a statute, or who has acted under that statute and in pursuance of the authority conferred by it, or who has claimed the benefit of the statute to the detriment of others, or who asserts rights under it, may not question its constitutionality." 12 Corpus Juris, 769 and cases cited.

"It must be apparent that if the confiscatory rate is fixed, not by the municipality, but by the utility company, the State has done no act 'depriving' the company of its constitutional rights. It must likewise be apparent that if the rate is the joint act of the utility company and the city, if the utility company has consented to the rate, that it has waived the constitutional right which it might otherwise assert, and I am convinced that if a rate is fixed by agreement of the utility company, *which at the time is a reasonable rate*, but which thereafter becomes confiscatory, *without any act of the state*, but simply as a *result of industrial conditions*, that the prohibition of the Fourteenth Amendment upon the State is not violated by the State."

"This is a serious business, restraining the sovereign act of a State. There is no constitutional guaranty of compensatory rates. So far as income and profits were concerned, the utility corporation stands exactly in the same position as the building corporation, or the street improvement company. It may make money—it may lose money; but only when the State has acted affirmatively to the deprivation of reasonable income upon actual investment, can constitutional guaranty be invoked; and where the utility company consents to the act of

the state, there is not that 'deprivation' or 'denial' which the Constitution forbids."

In the case in bar both parties consented during the existence of the abnormal condition specified, to the rate and regulations attached in plaintiff's bill. By no affirmative act of the State or municipality were the rate and regulations changed without the consent of the Company or its predecessors. The rate and regulations were not only expressly agreed to by the Company, but were by the Company actually acquiesced in and confirmed for a long period of years. They are, in effect, the same today as they were in 1899, with the exceptions of the half rate for children and corresponding transfers provided for by the State and city legislation in 1903. It is, therefore, clear that the changes in conditions, as already pointed out, are not due to any affirmative act of state or city, but are due to a change in industrial conditions over which neither the State nor the city can exercise control. Can it be properly or truthfully stated, in this case, that either the State or the city has, by its afrimative act, deprived plaintiff of its property without due process of law, or has denied or is denying plaintiff the equal protection of the laws?"

VI.

THAT THE ACTION OF THE STATE IN PASSING THE HALF FARE LAW DOES NOT VACATE OR AVOID THE CONTRACT, BUT SIMPLY CONSTITUTES A REGULATION OF IT WHICH REGULATION IS SUBJECT TO REVIEW BY THE COURTS SHOULD OCCASION WARRANT.

But the Complainant contends that the action of the State in passing the half fare law contested in the Altgelt

case avoids its agreement with the city and sets the contract at naught.

Appellants admit no such conclusion. Under the law as it existed in 1899, the contract was undoubtedly controllable by the State. It was not, however, subject to absolute destruction as is clearly shown by the decision of the Supreme Court of Texas in the Houston case, 83 Texas. Moreover, the right to regulate and control which was exercisable by the State was limited as shown by the decision in the Altgelt case for this court there says:

> "Under the Bill of Rights of that Constitution the Legislature could not reduce the fares to a confiscatory amount, or to an amount which would render it unprofitable to operate the road. There is no allegation of that kind in this bill, and no evidence that the reduction of the school tickets in question would seriously impair its revenues. Indeed it was found in the opinion of the Court below that it was not contended there, and that there was nothing in the evidence tending to show, that the rate of fare claimed by the appellee under the act of 1903, is not such as to leave to the company a sufficient income to pay for repairs and a fair income on its investment."

The mere fact that the agreement was subject to this control by the Legislature did not keep it from being a contract and did not avoid it. The parties entered into the agreement charged with notice of the fact that the franchise and special provisions granted were subject to the future control by the Legislature. The agreement was not subject, however, to change by the parties. The right to regulate and control it being exclusively reserved to the Legislature of the State.

If the regulation imposed by the State is confiscatory the Company might have just grounds to complain in a

court of equity of that regulation. A suit might be instituted in such a court under the decision in the Altgelt case against the half-fare law if that law is now taking the Complainants property without due process, but the San Antonio Public Service Company cannot, simply because of this half-fare law brush its entire contract aside and say that for the future it will operate upon the streets of the City of San Antonio without restriction or limitation.

VII.

CONCLUSION.

It is a strange commentary on the mutability of human affairs when we consider the position taken by appellee's counsel in this case. When we turn to the briefs in the Altgelt case, both in the Court of Civil Appeals of Texas and in this Court we find the counsel for the Complainant's predecessor, earnestly asserting that the franchise ordinance was a contract, and that the city had full power to make it. *"Tempora mutantur, et nos mutamur in illis."*

Today we find them as earnestly asserting that it was not a contract and if it was a contract the city was without power to enter into it. Yet no court in the meantime has said it was not a contract, and no court has held that the city was powerless in the premises, until the decision of the district court in the case at bar. Appellants submit that in this holding the learned judge was in error.

They pray this Court to reverse his decision and order the bill dismissed. In the alternative they pray the Court to reverse and render the case in their favor or, refusing this, to reverse and remand the case for new trial.

Respectfully submitted,

R. J. McMILLAN,
Solicitor for Appellants.

CLAUDE V. BIRKHEAD,
City Attorney.

TERRELL, DAVIS, HUFF & McMILLAN,
of Counsel.

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No. 263.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

CITY OF SAN ANTONIO, *et al*, APPELLANTS,

VERSUS

SAN ANTONIO PUBLIC SERVICE COMPANY,
APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE
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DISTRICT OF TEXAS.

Reply Brief for Appellants, Defendants Below.

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Appellees, on page 11 of their brief, raise some question as to our citations from the City Charter, stating that Subdivision Fourth (4th) of Section One (1), Article One (1), is not contained in the statement of the evidence, or the

Master's or the Court's findings. The agreed statement of the evidence, on page 124 of the Transcript of the Record, contains the following:

> "The parties hereto further agree that the Charters of the City of San Antonio in effect March 16, 1899, and July, 1917, having been declared by their terms public acts, properly certified copies of same may be considered by the court without the necescity for copying said Charters in their entirety in this agreed statement of the evidence."

In view of this stipulation, Appellants feel that their action in copying any portion of the City Charter applying to this case is entirely warranted, provided certified copies of same are filed with the court.

We further desire to direct the court's attention to another provision of the City Charter, which was contained in the Charter at the time the franchise of 1899 was granted and a similiar provision which was contained in the Charter when the 1917 Consolidation Ordinance was passed. Sections 42 and 57 of the Charters in effect in 1899, read as follows:

> "Sec. 42. The City Council shall have the care, management and control of the City and its property and finances; and shall have power to enact and ordain any and all ordinances not repugnant to the constitution and laws of this State, and such ordinances to alter, modify or repeal, and shall have power by ordinance:"
>
> "Sec. 57. To have the exclusive control and power over the streets, alleys, sidewalks, lanes, avenues and public grounds and highways of the City and to abate and remove encroachments or obstructions thereon; to open, alter, widen, straighten, extend, establish, abolish, regulate, grade, re-grade, clean, pave, macadamize or otherwise improve the same;

to put drains and sewers therein and to prevent the encumbering thereof in any manner, and to protect the same from any encroachments or injury."

Sections 51 and 90 of the City Charter in effect in 1917, in so far as they apply to the issue at bar, are as follows:

> "Section 51. * * * The Board of Commissioners shall have the care, management and control of the City, its property and finances, and shall have power to enact, ordain, alter, modify or repeal any and all ordinances not repugnant to this Charter and the constitution and laws of the State, and shall have power, by ordinance:"
>
> "Section 90. * * * To have the exclusive control and power over the streets, alleys, sidewalks and public grounds and highways of the City, and to abate and remove encroachments or obstructions thereon."

Section 99 of the Charter in effect in 1899 and Section 94 of the Charter in effect in 1917, contain the following:

> "Section 94. * * * To direct and control the laying and construction of the railroad and street railway tracks, turnouts and switches and prohibit the same in the streets, avenues and alleys, and regulate the location of depot grounds within the City;"
>
> "Section 99. "To direct and control the laying and construction of railroad tracks, turnouts and switches, or prohibit the same in the streets, avenues and alleys, and location of depot grounds within the City;"

We especially call the court's attention to these Sections of the Charter for the reason that the Texas Appellate Courts have given extremely broad significance to these provisions and the rights of the City thereunder. See Green vs. City of San Antonio, 138 S. W., 7; Peters vs.

City of San Antonio, 195 S. W., 989; Craddock vs. City of San Antonio, 198 S. W., 634.

The Sections of the Charter quoted, are particularly pertinent with regard to the City's right to make the contract, in view of the decision of the Supreme Court in the case of Mayor *et al* vs. Houston Street Railway, 83 Tex., 548. In that instance, the City of Houston had in its Charter a provision practically identical with the Charter provision above quoted, to-wit, that the City Council should have exclusive control and regulation of all streets, etc., within the corporate limits, and the right to direct and control the laying and construction of railway tracks, etc. In discussing that provision of the Charter the Supreme Court said in that case they were of the opinion that by its terms (as well as by the terms of the Charter to the Street Railway Company), the Legislature intended to, and did confer ample authority upon the City Council to grant the franchise, and that said grant having been duly accepted, became a vested right or perfect contract.

See also Case of Shreveport Traction Company vs. Shreveport, decided by the Supreme Court of Louisiana, 47 S. W., 40; 129 Am. State Reports, 345, where the court upholding a franchise agreement of this character says:

> "There is no express legislation in this State authorizing municipalities to establish rates for street railroads by contract or agreement. But such power necessarily flows from the statutory prohibition that no railroad shall be constructed through the streets of any incorporated city without the consent of the municipal council thereof, and from the general power of regulating the use of streets: Rev. Stats. 1870, sec. 689; Act No. 131, p. 184, of 1855, sec. 7; Brown vs. Duplessis, 14 La. Ann., 842; Forman vs. New Orleans & C. R. R. Co., 40 La. Ann., 446, 4 South., 246."

There is nothing in the Statutes of the State of Texas, in the Charter of the City of San Antonio, or in the Constitution of the State, prohibiting the City from making a contract of this kind, unless Section Seventeen (17), of Article One (1), of the State Constitution be so construed. We have in our original brief discussed the reason why such construction should not be placed upon that provision of the Constitution. Appellees, in their brief, take the broad position that Section 17 makes the attempted contract absolutely void. They cite no authority for this, and it seems clear to us that such is not the effect.

The constitutional provision is simply a reservation of power to the State, and is not an absolute prohibition against the making of contracts of this character. If such were the fact, the contracts upheld in the various Ohio cases by this court would have been void, for the Constitution of Ohio contains a provision so nearly identical with the Texas Constitution as to be almost the same. Section Two (2) of Article One (1), of the Ohio Constitution, as adopted in 1851, is as follows:

> "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed, by the general assembly."

For convenience, we re-copy Section 17, of Article 1, of the Texas Constitution:

> "No irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature or created under its authority shall be subject to the control thereof."

If Appellee's contention be correct, it is difficult to understand the decision of this court in the Cleveland case and the Columbus case. A very similar provision is contained in the Constitution of the State of Michigan, despite which fact, this court sustained the franchise contract in the Detroit case.

Appellee attempt to appropriate the case of Galveston Railway Company vs. City of Galveston, 90 Tex., 398, as their own, and boldly assert that it is authority for their position. We submit to the court a close inspection of this decision, will show that it is against them. It must be borne in mind that the Supreme Court was there dealing with a Steam Railway, and not a Street Railway Company. Steam Railroads unquestionably receive their authority to go upon streets of cities and towns from the Legislature. The Legislature, as shown by the opinion in the case, had passed a statute providing that the tracks could only be laid upon city streets with the consent of the municipal authorities. This was merely a concession from the Legislature to the cities and could be granted or withdrawn as the Legislature saw fit. The original source of authority in the premises was, however, the Legislature, and not the city. In the case of Street Railways, however, the Legislature cannot grant the right, in Texas, for them to go upon the streets of a city without the consent of the city authorities, because of the prohibition contained in Section 7 of Article 10, of the State Constitution. It is true, as stated by this court in the Altgelt case, that there is nothing in that provision to prevent the Legislature from chartering the Street Railway, provided the consent of the city can be obtained, but the Legislature's authority in the premises is absolutely limited by the constitutional provision. Accordingly, the right to occupy the streets of the city being solely dependent upon the action of such city, the latter

may, in granting its consent, prescribe terms for the breach of which the right granted may be forfeited. This was the construction placed upon the Galvestion decision by the Court of Appeals in the Athens Telephone case; and as stated in our original brief, a writ of error was denied by the Supreme Court. This decision was a matter of great import to the State of Texas, and vitally affected the substantive law of this State. Had the Supreme Court of Texas not endorsed this construction of the Galveston case, a writ of error would most certainly have been granted. The Athens case has been followed a number of times by very late decisions in our courts, the same interpretation being given in each instance. In a late case, not cited in our original brief, Texas Telephone Company vs. City of Mart, 226 S. W., 497, it is followed again by one of the Texas Courts of Appeal, and cited with approval. The Mart case is also a rate case. Counsel for Appellee are disposed to quarrel with the decision in the Athens case, and express their personal opinion that it is not the law of the State, and that it does not correctly construe the Galveston case. It is idle for counsel to question what the courts of last resort mean in the face of their very clear statements of what they hold to be the law.

Passing to another point, appellee contend that even should it be held that the City had the right to make this contract, same was subject to be determined by the action of the Legislature, and the Legislature having acted by passing the Half Fare Law, the contract was abrogated. Should this be held to be the case, we call the court's attention to the fact that the Half Fare Law was passed in 1903, and complainant's predecessor, after litigating the matter out with private individual, to-wit, George Altgelt, acquiesced in that law until 1917.

In 1917, the Consolidation Ordinace was applied for and accepted. The effect of this Ordinance has been fully argued in the main brief. Since the passage and acceptance of this Ordinance, no action tending to change same or the contract engendered thereby, has been taken either by the City or the State. Accordingly, Appellee are in the same position, having re-bound themselves since the passage of the Half Fare Law, as they would be if same had never been passed. This phase of the matter is discussed in the Manitowoc case, 129 N. W., 925, which decision is mentioned and discussed by this court in Milwaukee Railway & Light Company vs. Railway Commission of Wisconsin, 238 U. S., 174.

Passing to another point, Appellee states, under its subdivision three (3), on pages 40 and 41 of their brief, that Section 17 of Article 1, applies to the City of San Antonio after it became a Home Rule City. In this, Appellee's counsel is in error. Section 17, Article 1, of the State Constitution, applies only to the State Legislature. It specifically states that all privileges and franchises granted by the Legislature or created under its authority shall be subject to the control thereof. Since the passage of the Home Rule Amendment to the Texas Constitution, the Home Rule Cities of Texas do not derive any authority from the Legislature. This is clearly shown by the decision in Xydias Amusement Company vs. City of Houston, 185 S. W., 415, an excerpt from which is cited to this court in our main brief. Section 17, is a limitation upon the Legislature, and those acting under its authority, only, and is not a limitation upon Home Rule Cities. There is nothing in the Constitution of Texas, as it now exists, to prevent any Home Rule City, which derives its authority directly from the sovereign people, granting any irrevocable or special privilege or immunity, if it desires to do so. The

provision in the Home Rule Amendment to the Constitution which says no ordinance or charter shall contain any provision inconsistent with the Constitution of the State, is not offended against, as there is no such inconsistency. The only provision against such a grant is limited, as shown above, to the Legislature and those acting under its authority.

Appellants here now pray as they have heretofore prayed in their original brief on file herein.

Respectfully submitted,

R. J. McMILLAN,
Solicitor for Appellants.

CLAUDE V. BIRKHEAD,
City Attorney.

TERRELL, DAVIS, HUFF & McMILLAN,
Of Counsel.

FILE COPY

Office Supreme Court,
FILED
MAR 5 1920
JAMES D. MAHER

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. ~~756.~~ 263

CITY OF SAN ANTONIO ET AL., APPELLANTS,

vs.

SAN ANTONIO PUBLIC SERVICE COMPANY,
APPELLEE.

MOTION TO ADVANCE.

Come now the City of San Antonio and Sam C. Bell, Ray Lambert, Louis Heuermann, Andres Coy, Phil Wright, and R. J. McMillan, appellants, and move that the above-entitled cause be advanced upon the docket of this court, and in support of such motion respectfully show to the court—

The City of San Antonio and its officers, appellants, have been enjoined by final decree of the United States District Court for the Western District of Texas from enforcing certain franchise ordinance and other ordinances requiring appellee, the San Antonio Public Service Company, to furnish street-car transportation within the city of San Antonio for a fare of five cents with universal transfer. Appellant City asserts that it has a franchise contract with appellants

for such service, and that the lower court was without jurisdiction in the case and the bill without equity. Appellee asserts that the city was without authority under the constitution and laws of the State of Texas to make such a contract; that the enforcement of the ordinance was a taking of its property without due process of law.

The contention of appellee was sustained by the district court. The case is of public importance, because of the nature of the questions involved and of peculiar importance to the public of the State of Texas, because of the construction put by the trial court upon the constitution of the State as applied to franchise agreements by the public service companies and municipalities relating to rates. An early disposition of the case is of prime importance to the people of the city of San Antonio, because as the matter now stands the city is enjoined from enforcing the ordinances involved in this case and is precluded by the pendency of this appeal from altering or repealing said ordinances by passing other regulations.

Counsel for appellee have accepted service of a copy of this motion and agree to an advancement of the case if consistent with the rules and business of this court.

Respectfully submitted,

ROBERT J. McMILLAN,
Solicitor for Appellants.

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No. 263.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

CITY OF SAN ANTONIO, *et al*, APPELLANTS,

VERSUS

SAN ANTONIO PUBLIC SERVICE COMPANY,
APPELLEE.

APPEAL FROM DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

Brief for Appellee.

SATEMENT OF CASE.

We desire here to briefly summarize the issues as we understand them before this court and to call attention to some additional facts.

Under the undisputed facts in this case, and as found by the Master in Chancery and the Court, the plaintiff company could not earn a fair return on the value of its

property if compelled to operate at a five-cent fare. The Master found that "The fact that the company will not during the year 1919 and probably for several years, earn a reasonable return on the value of its property" was "so apparent from the record that it will not be disputed by the defendants." (Transcript of Record, pp. 46, 113, 123-124). The Master's report found that even on the valuation as fixed by him, $4,535,152.88 (Transcript of Record, p. 60), (which the company contended was too low) the earnings for 1919 could not exceed 3.88% and for the year 1918 it was only 4.36% (Transcript of Record, p. 123), and that for several years it had earned a less percentage. (Transcript of Record, p. 123). These findings were not excepted to by the appellants (defendants below). He also found that a fair return was 8%. (Transcript of Record, p. 122). These findings are also referred to and approved by the trial judge in his opinion on the ~~defendant's~~ plaintiffs exceptions to the Master's report. (Transcript of Record, pp. 113-114).

The ~~defendant~~ plaintiff excepted to the valuation as found by the Master as being entirely too low. The court sustained the exceptions to the Master's report recommending that the bill be dismissed for want of jurisdiction, and disapproved and denied that part of his report but found that it was unnecessary for the court to pass on the exceptions as to value because, as stated in the decree passing on the exceptions, "even under the valuation found by the Master and the return under the operating expenses as found by him, the company is not earning a fair return," and therefore deemed it unnecessary to pass on the question whether valuation of the company's property should be higher than that found by the Master. (Transcript of Record, pp. 115-116). The Master's report recommended the granting of an injunction if the court should differ with him on his recommendation that the bill be dismissed for want of jurisdiction—a ques-

tion that was never really referred to him as the court had already passed on that question in overruling defendants' motion to dismiss. (Transcript of Record, p. 31). In this connection, also see the order of the court passing on the exceptions of the Master (Transcript of Record, pp. 115-116) and the written opinion of the court filed in connection therewith. (Transcript of Record, pp. 111-115).

The Master's report has been copied in full in the Transcript of Record (pp. 38-91). Appellants filed no exceptions to it and no exceptions to the order of the court thereon. The trial court found that, even on the valuation as fixed by the Master, the five-cent fare rate was confiscatory and the final decree in this case enjoined the enforcement of the ordinances complained of which were intended to prevent the company from raising its fare. (See Decree, Transcript of Record, pp. 116-117).

QUESTIONS RAISED.

As the case stands before this court it is therefore undisputed that the rate was confiscatory and that appellee (plaintiff below) was being deprived of its property in violation of the Constitution of the United States and was entitled to the relief granted unless it is to be denied that relief because, as contended by appellants:

(1) The court had no jurisdiction. (Brief, pp. 29-37).

(2) The five-cents fare provision of the Franchise Ordinance of 1899 constituted a contract between the City and the Company, which prevented recovery regardless of whether the Company was earning a fair return on its property or not. (Brief, pp. 37-55).

(3) If the Franchise Ordinance of 1899 did not constitute a contract, nevertheless the Company became bound by contract by reason of what is known as the Consolidation Ordinance of 1917. (Brief, pp. 55-58).

(4) That if the fare provision in the Ordinance of 1899 did not constitute a contract, nevertheless it was a condition or limitation which plaintiff accepted and must therefore be denied relief in this case. (Brief, pp. 58-63).

(5) The rate of fare fixed by the Ordiance of 1899 was reasonable at that time and although it has now become confiscatory by reason of conditions arising since that time, the Company is not entitled to relief. (Brief, pp. 64-73).

We will take these contentions up in the order presented by appellants.

Brief of Argument for Appellee.

FIRST: In reply to appellants' First Point, that the court had no jurisdiction, we submit;

(1) Jurisdiction is determined by the allegations in the petition and the defendant's answer cannot be considered in connection therewith.

(2) The petition discloses a case of the taking of plaintiff's property in violation of the Constitution of the United States, and does not disclose, as appellants contend, a contract that would prevent recovery. However, the contract question is discussed more fully under the reply to the Second Point.

SECOND: In reply to appellants' Second Point, that the fare provision of 1899 constituted a contract, we submit;

(1) The five-cents fare provision in the Ordinance of 1899, relied on by appellants, cannot be construed as a

contract, because the City of San Antonio had no power to make such a contract.

(2) Said provision cannot be construed as a binding contract, because the making of such a contract is prohibited by Section 17, Article 1, of the State Constitution, and, if construed as a contract, would be illegal and void.

(3) Said provision was never intended as a contract but as a mere regulation, and the trial judge properly so construed it.

(4) Even though it should be held that the trial judge was not justified in construing the provision as a regulation and not a contract from the terms of the ordinance itself, nevertheless, he had a right to take into consideration the facts and circumstances surrounding the parties at the time of the adoption of said ordinance and the subsequent conduct of the parties in reference thereto in determining whether they intended it as a regulation or a contract, and his finding that it was intended as a regulation is amply supported by the evidence and insofar as it is based on facts outside of the ordinance will not be reviewed by this court.

(5) Even if said provision could be construed as a contract between the City and the Company binding until action with reference to street car fares was taken by the State, it became inoperative as soon as the State saw fit to legislate in regard thereto by passing the Half-Fare Law in 1903.

(6) Even if said provision can be construed as a contract, the City has repealed and repudiated it by the passage of the Half-Fare City Ordinance, the ordinance compelling the free transportation of firemen and policemen, and by other acts hereinafter set out, and is estopped from claiming it to be a contract.

THIRD: In reply to appellants' Third Point, that the Consolidation Ordiance of 1917 constituted a contract, we submit;

(1) The City was under the same disability as to lack of power and under the same prohibition by Section 17, Article 1, of the State Constitution, in 1917 as it was in 1899.

(2) The Consolidation Ordinance of 1917 did not change the relation between the City and the San Antonio Public Service Company a particle from that which had theretofore existed between it and the San Antonio Traction Company—in other words, plaintiff herein assumed exactly the same relation to the City that its predecessor had occupied and none other.

(3) The Consolidation Ordinance affirmatively shows the City did not consider that the matter of street car fares had been or was thereby being fixed by contract, because it plainly shows that the City was reserving the right to regulate same.

FOURTH: In reply to the Fourth Point, that the fare provision constituted a condition which was accepted and which forbids a change in the fare, we submit;

(1) Under our decisions conditions subsequent are looked upon with disfavor and are strictly construed, and a provision will not be construed as a condition but rather as a covenant unless a condition is expressed by clear and unambiguous terms.

(2) The provision does not purport to be a condition or use any language that would justify a court in holding it to be such, and the finding of the trial judge that it was intended a regulation was a proper construction thereof and was amply supported by evidence showing such intention.

(3) The City was prohibited by the State Constitution from imposing any such condition.

(4) The City had no power under its charter to impose any such condition.

FIFTH: We regard the fifth and sixth subdivisions of appellant's brief as related to the other points raised and they are replied to partly under our reply to the other points and briefly under the fifth and sixth subdivisions hereof.

I.

Reply to Appellants' First Point:

Appellants contend that the court had no jurisdiction because plaintiffs' petition showed on its face that it was bound by contract. In view of the rule laid down by this court in Taylor vs. Anderson, 234 U. S., 74, that the jurisdiction of the court is determined from the plaintiffs' statement of his own claim in the bill or declaration unaided by anything alleged as a matter of defense and in view of the allegations in the bill in this case we do not think this contention worthy of serious consideration. It is true the petition set out the Franchise Ordinance in full, but it went further and set up that this provision was never intended as a contract by the parties but was merely intended as a regulation and alleged certain facts intended to show what the real intention of the parties were. It also alleged that if it was intended as a contract that the City was without power to make it, and was prohibited by the State Constitution from making it, and, further, that if it ever was a contract, it had been avoided by the act of the State Legislature in the passage of the Half-Fare Law and had been repudiated by the City by the passage of the Half-Fare City

Ordinance and the ordinance requiring the free transportation of policemen and firemen, and that the City by reason of these and other acts alleged was estopped from relying on it as a contract.

Clearly, the court could not determine by merely looking at the petition, that the fare provision in the ordinance constituted a contract at the time of the filing of the suit regardless of the facts alleged, and therefore properly held that he had jurisdiction in the case. We deem it unnecessary to discuss this point further, especially in view of the fact that the question as to whether the five-cent fare provision constituted a contract will be fully discussed by us under the second point made by appellants.

II.

Reply to Appellants' Second Point:

In reply to the *Second Point* made by counsel in their brief (pp. 37-55) to the effect that the five-cent fare provision in the Franchise Ordinance of 1899 constituted such a contract as to deny the appellee relief, regardless of whether the rate was confiscatory or not, we will here discuss the effect of the provision of the ordinance of 1899, and the Consolidation Ordinance of 1917 will be discussed separately under our reply to the *Third Point* made by appellants in their brief.

The provision of the Ordinance of March, 1899, relied by appellants as a contract is as follows:

> "The said street railway companies shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other." (See Transcript of Record, pp. 5-6, where ordinance printed in full).

We submit that this proposition urged by appellants is unsound because: (1) As found by the trial court, the provision was never intended as a contract but merely as a regulation. (2) The City had never been authorized by the Legislature to make such a contract. (3) The City was prohibited by Section 17, Article 1, of the State Constitution from making such contract. (4) Even if it could be construed as a contract effective until action should be taken by the State, the State, having acted by passing the Half-Fare Law of 1903, it became inoperative. (5) Even if it could be construed as a contract that ever was effective between the City and the Company, it was repudiated and repealed by the City by the passage of the City Half-Fare Ordinance and the Ordinace requiring the free transportation of firemen and policemen, and by other acts of the City to be hereafter referred to, and by reason of these acts, the City is estopped to set it up as a contract.

In discussing the proposition as to whether the five-cent fare provision in the ordinance of 1899 relied on by the City constitutes a contract, we deem it proper to follow the course adopted by this court in the case of Home Telephone Company vs. Los Angeles, 211 U. S., 265, and first refer to the question that must lie at the threshold of the contract question, and that is, as to whether or not the City had the *power* to make such a contract, for, as said by Justice Moody in that case, *"It is needless to consider whether a contract in fact was made until it is determined whether the authority to make the contract was vested in the City."*

We think the record in this case clearly shows (1) not only did the City have no authority to make the contract, but (2) it was expressly prohibited by Section 17 of Article 1 of the Constitution of this State from making such contract.

Taking these questions up in their order, we call the court's attention to the fact that it has been repeatedly held by the Supreme Court of this State that municipalities are creatures of the Legislature and have only such powers as are granted by *express* words or necessarily and fairly implied as incident to the powers so expressly granted and the power must be essential to the declared objects and purposes of the corporation—not simply convenient *but indispensable.* Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the city corporation and the power is denied.

City vs. Railway Company, 66 Tex., 461.
Brenham vs. Water Works Company, 67 Tex., 553.
Galveston vs. Railway Company, 90 Tex., 411.

The powers granted to municipal corporations are strictly construed and a power will be implied only when without its exercise an express duty or authority would be nugatory.

Walschmit vs. New Braunfels, 193 S. W., 1077.
Cleburne vs. Railway Company, 66 Tex., 451.

These authorities simply establish the same rule in this State that is recognized generally by the courts and by this court, and with these principles in view let us look at the charter provisions of the City of San Antonio that were in existence in 1899 when it is claimed the contract was made.

The only provisions of the city charter on which the appellants relied in the court below as giving the power to make a contract with reference to rates were Sections 99 and 100. (See Transcript of Record 119). In their brief here counsel for appellants seem to have abandoned any reliance on Section 99 relative to steam railroads and here urge Section 4, Art. 1, and Section 100, as being sufficient

to grant the City authority to make such contract. Section 4 of Article 1 was not relied on in the lower court and is not included in the statement of the evidence, or master's or the court's findings, and we take it will not be considered by the court here. (See Transcript pages 19 and 121). However, if it be considered, it clearly has no application as it refers only to making contracts with reference to the "property and concerns of the City necessary to the exercise of its corporative administrative powers." Instead of being Section 4 it is really the Fourth Subdivision of Section 1, Article 1. This section contained four subdivisions, the first giving the City the power to sue and be sued; the second, to purchase and hold property for use of the City; third, to sell and convey property; the fourth, as above set out, and the fifth, to have a corporate seal. It is apparent that it relates to the administrative powers of the City with reference to its property and concerns and has no reference to rate regulation. In the court below counsel relied on Section 100 of the Charter and this was the only one that the trial judge deemed it material to consider. (See opinion on motion to dismiss, Transcript of Record, p. 28).

Section 100 is as follows:

> "Section 100. Exclusively to prevent, control and regulate everything connected with city railroads, and make such rules and regulations for the same as the city council may deem necessary."

It seems to us that the decision of this court in the case of Home Telephone Company vs. Los Angeles clearly settles the question that the sections of the city charter relied on by the city were insufficient to give the city power to make contracts fixing street railway fares. In that case the charter provisions of the City of Los Angeles were much broader in this respect than were those of the City of San Antonio. (See 211 U. S., 274, 275). There the charter

not only gave specific power "by ordinance * * * to regulate telephone service and the use of telephones within the city, * * * and to fix and determine the charges for telephones and telephone service and connections", but it contained many other very broad provisions that are copied in the margin on pages 274-5, above referred to. This court held that, while the provisions were ample to give "authority to exercise the governmental power of *regulating charges*," they gave "no authority to enter into a contract to *abandon the governmental power itself*."

In addition to the powers contained in the charter, which are above set out, it was contended that the Broughton Act of the Legislature enlarged the power of the city and in connection with the charter clearly gave the power to contract. This act required "an application for a franchise to be filed, and, in the discretion of the council, published; that the publication must state 'the character of the franchise;' that the City is entitled to a percentage of the receipts; that the grantee must give bond to perform 'every condition of the franchise;' that no condition shall be inserted to restrict competition or favor one person against the other; and that the franchise must be sold to the highest bidder." (Page 276). But, notwithstanding the broad provisions of the charter and these provisions of the Broughton Act, this court held that they were not sufficient to authorize the city to make a contract and that it would not "be supposed that the Legislature intended that so significant and important an authority as that of contracting away the power of regulation as that conferred by the charter should be inferred from the act in the absence of a grant in express words," and indicated that nothing "less than a clear and affirmative expression would be sufficient foundation upon which to rest an authority of this nature."

The language of Section 100 clearly refers to governmental power of regulation and we cannot describe it better

than this court has described it in the above case, when it referred to the provision in the Los Angeles charter, as follows:

> "It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitted to describe the authority to contract. It authorizes command but not agreement." (274).

The decision of this court in the Home Telephone case has been so repeatedly affirmed by this court that we do not deem it necessary to undertake to recite all such opinions, but will refer to—

> Milwaukee Railway Company vs. Commission, 238 U. S., 181.
>
> Winchester vs. Winchester Water Works, 251 U. S., 192.

The opinion of the trial court in the case at bar has recently been cited with approval by the Supreme Court of Iowa in the case of Ottumwa Ry. & Light Co. vs. City of Ottumwa, 178 N. W., 905, where it was held that a five-cents fare provision in the franchise ordinance did not constitute a contract, and the Supreme Court enjoined the city from interfering with the railway company in raising its fares above five-cents. The court cites numerous opinions from this and other courts to the effect that the right to fix rates cannot be contracted away unless the power to do so is clearly given by the Legislature and says;

> "In fewer words the cases proceed on the general theory that it is against public policy to contract for unchanging rates; that there must be no such contract, because its enforcement might, on the one hand, fasten what proves to be an exhorbitant charge upon the patrons, or, on the other, *prove a rate that will confiscate the property of the Service Corporation.* While there are other lines of rea-

> soning advanced in the authorities, in the main and at the present time, the decisions run on the broad ground that public policy forbids such contracts, unless the Legislature, the ultimate judge of what is public policy, declares unmistakably that such contracts do not offend that policy."

In the case at bar not only has the Legislature not authorized the making of such contract, but the State Constitution, a higher source than the Legislature, forbids it.

In the recent case of Knoxville Gas Company vs. City of Knoxville, 261 Fed., 283, the Circuit Court of Appeals for the Sixth Circuit held that the City of Knoxville, which had much broader charter powers than the City of San Antonio, was not authorized to make a contract as to rates, and that the company was entitled to raise its rates above those fixed in the franchise ordinance.

In the recent case of Southwestern Railway Co. vs. Commission, 219 S. W. (Mo.) 381, the Supreme Court of Missouri held that a provision of the Missouri Constitution, which forbids the Legislature from granting the right to construct street railways within a city without first acquiring the consent of the city, and which is substantially identical with Section 7 of Article X of the Constitution of this State relied on by appellants, did not "in terms nor by necessary intendment, devolve upon the municipalities therein mentioned any part of the unrestricted power of the Legislature to deal with all matters pertaining to the policy and power of the State where not constitutionally prohibited from so doing," and that; "no municipality, either by ordinance or contract, can impose upon a public utility essential to the welfare of the people conditions of operation or maintenance which would confiscate its property or destroy its power to serve the public."

(2) The City was prohibited by the Constitution of Texas, from making such a contract.

Coming now to our contention that the City was prohibited by Section 17, Article 1, of the State Constitution from making such a contract as the City claims this provision of the ordinance to be, we quote that Section of the Constitution as follows:

> "No irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature or created under its authority shall be subject to the control thereof."

Counsel for appellants have cited certain Texas cases in an attempt to show that this provision of the Constitution does not apply to contracts between a city and a street railway company regulating fares. We will review these decisions later and feel confident that we can show they do not support the claim made by appellants' counsel. This would seem, however, to be an unnecessary task in view of the fact that the Texas courts and this court in the case of San Antonio Traction Company vs. Altgelt, 200 U. S., 304, held that Section 17 of Article 1, of the State Constitution did apply to this very provision of the ordinance of March 16, 1899. The question there under discussion was the validity of the State Half-Fare Law requiring street railway companies to carry children for half fare. The San Antonio Traction Company contested that law and contended that this identical provision constituted a contract with the City for a five-cent fare and that the law was therefore violative of that contract. The case was decided against it by all the Texas courts and by this court. Neither the Court of Civil Appeals in Texas (from which opinion a writ of error was refused by the Supreme Court of the State) nor this court found it necessary to pass on the question as to whether or not the provision was intended as a contract between the City and Company, but the Texas courts and this court held in effect that no mat-

ter what it was, this provision of the Constitution applied to it, and that, therefore, the statute was valid and could be enforced. The plain holding in both the State courts and in this court in the Altgelt case is to the effect that, if the five-cent fare provision here in controversy and also in controversy in that case was intended as a contract, then it came within the terms of Section 17, Article 1, of the State Constitution as being an attempt to make an "irrevocable or uncontrollable grant of special privileges or immunities" that was forbidden by this section of the Constitution. Counsel for the City seem to concede that this decision holds that the Legislature is prohibited by Section 17 of Article 1 from making such a contract, but, notwithstanding that fact contend the City may make it. This is a strange position and it seems to us it ought not to require the citation of authorities to sustain the proposition that what a Legislature is forbidden by a state constitution to do itself it is forbidden to authorize others to do. We have always understood the law to be that what a person does by another he does himself. Clearly, what the Legislature was prohibited to do itself, it was prohibited to do by or through another. Counsel for appellants cannot contest the proposition that, if the City had the power to make the contract, it derived that power from the Legislature, and, this being true, they are forced into the strange and unexplainable position that, although the Legislature of Texas was prohibited by this constitutional provision from making such a contract itself, it could authorize the City to do so. We cannot believe that such a contention merits serious consideration, but we call the court's attention to the fact that the first clause of this section denounces such contracts as illegal and denies the right to make the same and the second clause declares that "all privileges and franchises granted by the Legislature, *or created under its authority*, shall be subject to the control thereof." The Altgelt case

having settled the proposition that, if this fare provision of the ordinance was intended as a contract fixing a fare for a period of forty years, then it constituted an "irrevocable and uncontrollable grant of special privileges and immunities" such as are denounced by Section 17, it necessarily follows that, if it was intended as such a contract, it was illegal and void for it is well settled in this State that contracts made in violation of statutes or of a provision of the Constitution are absolutely void and that no rights whatever can be claimed under them.

Edwards County vs. Jennings, 89 Tex., 618.
T. & B. Ry. Co. vs. Lawson, 98 Tex., 394.
Raywood Company vs. Erp, 105 Tex., 159.

If Section 17 had stopped at the end of the first clause it would have been just as effective because it would have declared "irrevocable and uncontrollable" grants of special privileges illegal. The second clause really adds nothing to its meaning unless it be to make more clear that the section was intended not only to cover the acts of the Legislature but all of its agencies.

Counsel for appellants draw the conclusion (on p. 38 of their brief) that this court in the Altgelt case regarded this provision as a contract, and that the Court of Civil Appeals declined to hold that it was not a contract. We do not so construe these decisions, but on the contrary, regard them as having held in effect that the provision did not constitute a contract. The legal idea of a contract is that it is an agreement binding on the parties making it, and if one of the parties is acting as agent for another, then that it is binding on his principal as well as on the other party. Now, it is undisputed under the record in this case that whatever the City undertook to do it had to undertake by virtue of powers delegated to it by the State

Legislature. It had power to act only in-so-far as the Legislature had authorized it to act, and in-so-far as it was not prohibited by the Constitution from acting. Therefore, if it was intended by the City that this five-cent fare provision in the ordinance of 1899 was a contract, then we have the City acting as agent for the State as one party to the contract, and the Company acting for itself as the other party. If the City had the power to act at all, it had the power to bind its principal because it could only act in-so-far as its principal had authorized. But this court and the State courts directly held in the Altgelt case that it was not a contract binding on the State of Texas—the City's principal. The Court of Civil Appeals in the Altgelt case did not deem it necessary to pass on the direct question as to whether or not it was intended to or did constitute a contract, but simply said even if it "can be deemed a contract" it was contained in an ordinance passed twenty-three years after the adoption of the State Constitution of 1876, and therefore fell under the provisions of Section 17, of Article 1, of the said Constitution and was not binding on the State, and the Company was not entitled by virtue thereof to defeat the enforcement of the State Half-Fare Law. The Texas courts, as well as this court, in the Altgelt case recognized that if it was intended as a contract, then it was one of those "irrevocable or uncontrollable grants of special privileges" mentioned in Section 17, and that therefore it remained subject to the control of the Legislature, and the Legislature had the power to pass the State Half-fare Law. We think the logic of the decisions of all the courts in the Altgelt case necessarily carry the proposition further than simply to say that it remained "subject to the control of the Legislature." Being an "irrevocable or uncontrollable grant of special privileges" (if construed as a contract of fixing fares for forty years), then it was not merely subject to the "control of the Legislature," but

was absolutely illegal because it was expressly prohibited by this provision of the Constitution and being so prohibited it was null and void and not binding on anybody, and no one can assert any right thereunder. This is the clear holding of the Texas Supreme Court in the cases above cited. Therefore we say that this court, having held in the Altgelt case that this fare provision, if construed as a contract, came within the terms of Section 17, Article 1, of the Constitution, it was prohibited thereby and because of this fact was illegal and void and not binding on any of the parties thereto, but left the matter of fixing rates open for future regulation by the City in accordance with the powers given it by the State in its charter.

Referring to the authorities cited by appellants under this point of their brief, we deem it unnecessary to discuss the Detroit and Cleveland cases referred to, because this court has so often explained the holdings of these cases and based them on the fact that these cities had been explicitly authorized by the legislatures of these states to make such contracts and it was not contended in either of them that there was any constitutional prohibition either in Ohio or Michigan against the making of such contracts.

Milwaukee Railway Co. vs. Commission, 238 U. S., 181.

The first Texas case relied on under this point by appellants is that of Mayor vs. Houston Railway Company, 83 Tex., 551. In this connection, we desire to call the court's attention to the fact that this opinion is not by the Supreme Court but by Judge Marr, of Section A of the Commission of Appeals, and to the rule that has been laid down by the Supreme Court of this State to the effect that its adoption of one of the opinions of the Commission of Appeals, or its refusal of a writ of error to a Court of Civil Appeals, does not mean that it approves the reasoning on

all or any of the points discussed by the Commission or Court of Civil Appeals, but merely that it approves the *result* in the particular case. In other words, if a case is affirmed by the Commission or Court of Civil Appeals and the Supreme Court finds from examination of the record that it should be affirmed, it adopts the opinion because the result is correct notwithstanding it may believe that the reasons given for the affirmance are entirely wrong, and that there are other and different reasons why it should be affirmed. Therefore, this court cannot consider the reasoning in opinions, either by the Commission of Appeals or by the Courts of Civil Appeals of this State, as reflecting the views of the Supreme Court of this State or as being an authoritative expression of the law, because, as repeatedly held by the Supreme Court, such adoption or refusal of the writ is no indication that the court approves or intends to adopt the reasoning of the opinion or the grounds on which the affirmance or reversal is based, but merely that the result of the particular case—the affirmance or reversal—is correct.

Avery vs. Popper, 92 Tex., 344.
Aspley vs. Hawkins, 99 Tex., 381.

We will here review the Texas cases relied on by appellants under the point here made.

In the case of Mayor vs. Houston Railway Company, *supra*, the result of the case was clearly right and therefore the court adopted the opinion. In that case the charter was granted by the Legislature in 1870, which was six years before the Constitution of 1876 went into effect, and the provisions of this charter were very broad and the court found clearly conferred upon the City Council ample authority to enter the contract it did enter into. The Commission of Appeals admits in its opinion at the bottom of page 558 that the discussion as to Section 17,

Article 1, of the Constitution of 1876, was *obiter dicta*, and besides there was no such question under discussion as herein involved. The question there under consideration was whether a city could revoke a grant giving the right to lay tracks in the street after same had been accepted and the tracks laid. No question about the regulation of fares was involved.

In this connection, we desire to call the court's attention to the fact that this case was decided in 1892—twelve years before the decision of the Court of Civil Appeals of Texas in the Altgelt case and the refusal of a writ of error in that case by the Supreme Court. If the Supreme Court of Texas had put the same construction on that case as counsel for appellants it could not have refused a writ of error in the Altgelt case. The case was cited by this court in the Altgelt case.

The next case cited is the Rio Grande R. R. Co. vs. Brownsville, 45 Tex., 88, which arose prior to the adoption of the Constitution of 1876, and besides it related to the question of revoking the right given to lay a railroad in the streets and is based on certain State statutes that were then in force. It had no reference to rate regulation and undertook to decide no such question as is here presented.

In Athens Telephone Company vs. Athens, the question involved was whether or not a certain franchise ordinance constituted a contract between the City and the Telephone Company. The court practically based its holding on the ground that this was a local telephone company that derived its authority to go upon the streets from the city and not from the State. We doubt the correctness of the holding that telephone company derives its authority from the city and not from the State, but whether that be correct or not, it is not applicable to the facts of this case because it has been directly decided in this State that street

railway companies derive their authority from the State. As said by this court in the Altgelt case;

> "It is insisted by plaintiff in error that, under Section 7, Article X, of the State Constitution, above quoted, the power to grant street railways property rights and franchises, to construct and operate a street railway within a city, is withdrawn from the Legislature and conferred, if not by express words, then by necessary implication, upon the municipal authorities. We do not so read the section. It merely provides that no such law shall be passed by the Legislature granting the right to construct and operate a street railway without first acquiring the consent of the local authorities, but we see nothing to prevent the Legislature from chartering a street railway, provided such consent be acquired. Such we understand to be the ruling of the Supreme Court of that State in Taylor vs. Dunn, 80 Tex., 652-659 and Mayor vs. Houston Street Railway Co., 83 Tex., 548." (200 U. S. 307-8).

In the case at bar it is shown by the stipulation in the statement of the evidence that prior to 1899 the San Antonio Street Railway Company and the San Antonio Edison Company had been incorporated by the State of Texas, "for the purpose of constructing, owning and operating street railway systems in the City of San Antonio * * *" (Transcript of Record, p. 118).

While street railway companies have to acquire the consent of cities in order to go upon their streets, they still derive their authority from the State. The Court of Civil Appeals in this Athens case misstates the effect of the holding in the case of Galveston Railway Co. vs. Galveston, 90 Tex., 398.

Furthermore, there was no question in the Athens case as to what was meant by the provision of the ordinance under discussion. It clearly provided a maximum charge that could be made by the Telephone Company though apparently did not limit the City's power to reduce the rate

under proper conditions. In addition, it seems to have been doubtful whether the city had been given the right to regulate fares, and therefore it could not have been construed as a regulation. In the case at bar, the City had been given full power to regulate fares and the language of the provision in question is the language of regulation and not of contract or condition. In the case at bar, if the provision should be held as a contract or a condition, then the City would be prohibited thereby from lowering the fare notwithstanding it might have brought more than a reasonable return. Clearly, the Athens case has no application to the case at bar for the reasons stated, but in addition we call the court's attention to the fact that the refusal of a writ of error by the Supreme Court cannot be taken as an approval by that court of the reasoning of the Court of Civil Appeals. The *result* of the Athens case was correct because no contention was made on the appeal that the rate which the City was seeking to retain in force was unreasonable or confiscatory, and we take it that in the absence of such a showing by the Telephone Company, it could not prevent the enforcement of that rate regardless of whether it was a contract, condition or a regulation, because it was the company's duty under the common law, independent of any statute or contract to charge reasonable rates. Therefore the refusal of the writ of error was correct because the result of the particular case was correct, but in addition to the distinction here drawn we call the Court's attention to the fact that in the case of Galveston Ry. Co. vs. Galveston, 90 Tex., 398, the Supreme Court held directly that, in this State, a city has no right to annex any condition to its assent to the use of its streets, *which it has not been authorized by its charter to annex* and that any attempt to do so is void even though accepted by the company, and to construe the refusal of a writ of error in the Athens case (without written opinion) as an approval of

the contentions made by appellants would be, in effect, to hold that the Supreme Court of Texas thereby intended to overrule the Galveston case, and there can be no doubt that had it so intended, it would have written an opinion so stating.

The next case cited is Texarkana Gas & Electric Company vs City of Texarkana, 123 S. W., 213. No application for writ of error was ever made in this case, and hence it cannot be contended that it was ever approved by the Supreme Court, but it may be added here that in the case of Southwestern Telegraph & Telephone Company vs. City of Dallas, 174 S. W., 636, where the identical question was involved as to the right of a city to impose such a tax as was held invalid in the Texarkana case, notwithstanding the provisions in the franchise as to rates, an exactly contrary holding was made by the Court of Civil Appeals at Dallas. In that case the Court of Civil Appeals held that the City of Dallas was without power to fix a rate of charge by contract, and bases this holding on Section 17, Article 1, of the Constitution, and especially cites and relies on the decisions of the State courts and of this court in the Altgelt case. In that case the court said:

> "Thus it is clear that when the Legislature of this State confers upon any municipality the right of local self-government, it can only confer those powers not forbidden by the Constitution and if the appellee did in fact, under the testimony, intend at the time of the original entry of appellants' predecessor and at the several times subsequent thereto, when it permitted appellant to enlarge its equipment, extend its poles, etc., to confer such right free from future regulation and control by the appellee (the City), such intention is wholly ineffective, and immaterial, for the reason that the city was without such authority, even though the Legislature attempted to confer the authority by its charter, since the Legislature itself was incapable of so doing * *"

This latter case raised directly the question as to the power of the City to make a contract with the Company, and held that no such power existed and that if the City ordinance intended to do so it was ineffective and the Legislature could not authorize the City to pass any such ordinance. The Supreme Court refused a writ of error in this case.

The case of the City of Terrell vs. Terrell Electric Light Company, 187 S. W., 966, next cited by appellants, involved no question whatever as to the right of the city to make a contract as to fares. In that case the city contended that under the franchise the company was bound to manufacture its own current and could not purchase it from outside parties. The trial court did not so construe the franchise, but held that under the franchise there was nothing prohibiting the company from purchasing its current from other parties, and this decision was affirmed by the Court of Civil Appeals, hence it can have no applicability whatever to the case at bar.

The last case cited is that of Galveston Railway Company vs. Galveston, 90 Tex., 398, and this is really the only opinion by the Supreme Court of this State, arising after the Constitution of 1876, that is cited on this question by appellants, and we think it holds directly to the contrary of the proposition here asserted by appellants. In that case the City of Galveston had granted the Railway Company the right to lay its tracks on certain streets in the city, and among other conditions in the ordinance had provided by Section 10 thereof:

> "That all the privileges, rights, grants, etc., under this ordinance shall be forfeited if the said Railway Company fails to extend and build their road across the bay within five years after the passage of this ordinance."

This section clearly constituted a condition subsequent, and the question arose as to whether or not the city had any power to impose such a condition, as the railway company failed to make such extension within the five years and the city was seeking to enforce the forfeiture. The Supreme Court first reviewed the statutes of this State to determine whether or not the Railway Company had a right to go upon the streets of Galveston without the consent of the city council, and came to the conclusion that it did not have such right. After reviewing the statutes the court said;

> "By the change made in the statute the Legislature intended to give to towns and cities the unqualified right to consent or refuse without liability for damages."

The court then reviewed numerous cases on the power of cities to impose such conditions subsequent and held that the City of Galveston had no right to couple any such condition with its consent for the railroad company to use its streets. In this connection, the court said:

> "In order to sustain the claim that the city of Galveston had the right to couple with its consent for the railroad company to use its streets any conditions or terms that it might deem proper, we must invest the municipal corporation with such legislative authority over the subject as would make its actionthe source from which the railroad company derives its right to build on the streets or we must conclude that the city had as *full power to contract as a private person has*, and that the ordinance in *question constituted a contract between it* and the railroad company. Neither of these propositions is true as applied to the facts of this case.
>
> The scope of municipal power is well defined by the decisions of this court to be only such as are conferred upon a city or town by its charter, either expressly stated or implied as being necessary to the exercise of some power expressed. Bossburg

vs. McCrary, 77 Texas, 572; Taylor vs. Dunn, 80 Texas, 670." Galveston Railway Co. vs. Galveston, 90 Tex., 410-411.

We feel certain that an examination of the Texas decisions relied on by appellants will show that none of them have any application to the case at bar except the Galveston case and that it holds directly contrary to the contention made by them. We understand the rule of this court to be, that, while it gives much consideration to decisions of the highest court of the State, it determines for itself the question as to whether there was a contract and the obligation arising therefrom.

Detroit Railway vs. Michigan, 242 U. S. 249.
Milwaukee Railway vs. Commission, 238 U. S. 182.

THE PROVISION INTENDED AS A REGULATION AND NOT A CONTRACT.

The trial judge found that the five-cent fare provision in the ordinance of 1899 was never intended as a contract, but merely as a regulation and we submit, (a) that this is the proper legal construction to put on the provision, and, (b) that even if it should not be so construed from the ordinance alone the trial judge had a right to find from the evidence that such was the intention of the parties.

In arriving at this conclusion the trial judge had a right to take into consideration not only the instrument itself but all the surrounding circumstances as well as the want of capacity in the city to make such a contract and its subsequent action with reference thereto as tending to show the real intention of the parties. We take it that this court will not disturb that finding in so far as it is a finding of fact, or in other words, that this court will affirm the judgment of the lower court on this point un-

less it can say by looking at the instrument alone that it constituted a contract binding on the parties. Of course, if the instrument is clear and unambiguous, then no outside matters can be looked to and the construction thereof is purely a question of law, but if the ordinance does not show on its face that this rate provision constituted a contract and if the trial judge had a right, in arriving at the intention of the parties as to whether it was a contract or regulation, to look to extraneous matters, then his finding is not one of law that will be reviewed by this court for as said in Corpus Juris Volume 13, page 785;

> "In order that a pure question of law may be presented the terms of the contract must be uncontroverted and clear and unambiguous * * * The question must be one of construction, not intention."

It seems to us that, looking to the ordinance alone (which is copied in full on pages 2 to 4 of the transcript), it should be construed as not constituting a contract but merely as a regulation because this particular provision of the ordinance speaks in words of command and not agreement. It says the "Companies shall charge five-cent fare, etc." When we look to Section III of the ordinance, in which is taken up the question of furnishing street lights and lights for the city buildings, we find the language of the ordinance changes from that of command to that of agreement, because it says "the Company *agrees* to furnish the City of San Antonio and the City *agrees* to take for five (5) years from June 1, 1899, two hundred and fifty (250) electric arc lights of five hundred (500) watts capacity, for lighting its streets, parks, etc. * * * at Ninety Dollars ($90.00) per lamp per year; the form and minor *details of said contract to be mutually agreed upon.*" In the next clause of Section III the City "reserves the right to renew *this contract* for ten (10) years after the

expiration of *this contract* upon the same price, terms and conditions." In the next clause the Company *agrees* to furnish incandescent electricity to said city for lighting its buildings, etc." Thus it will be seen, that, when the ordinance referred to the rate of fare that should be charged by the company to the public, it used words of command, but, when it came to contracting for street lights and the lighting of city buildings, an abrupt change is made to words of agreement. Furthermore, Section IV of the ordinance provides that the companies shall remain subject to all ordinances of the city except those that are in conflict therewith. In this connection, it will also be noted that in Section III, where the ordinance spoke of a contract, it stated that *"the form and minor details of said contract"* would be mutually agreed upon. This, with the other provisions of Section III, shows clearly that the city council had in mind that it was making a contract with reference to street lamps and the lighting of city buildings whereby it agreed to pay a specific sum for a specific time, but it did not intend, by the language used in Section I, that the "Company shall charge five-cent fare for one continuous ride, etc.," to contract away its power to regulate rates in the future. In the case of Home Telephone Company vs. City of Los Angeles, 211 U. S., 265, this court held that to construe such a provision as a contract had the effect of extinguishing *pro tanto* an undoubted power of government and for that reason, "both its *existence* and the *authority* to make it must *clearly* and *unmistakably* appear, and *all doubts must be resolved in favor of the continuance of the power.*"

If the provision be construed as a contract, as the city claims it should be, then the city would have no right to reduce the rate no matter how large a return the Company might have been able to make thereunder. Now, we take it that if the prices of material and labor had gone down

instead of up and the city had reduced the fare from five cents to three cents and had been able to show that the company could make a fair return under the three-cent fare, we would have had very little show, in view of the decisions of this court in Altgelt case and the case of Home Telephone Company vs. Los Angeles, *supra*, and other cases following it, to contend in this court that this provision was a contract or that the city was thereby prohibited from reducing the fare.

In the case of Rogers Park Water Co. vs. Fergus, 180 U. S. 624, the village of Rogers Park had granted the Water Company a thirty-year franchise and Section 12 of this franchise ordinance provided that;

> "The said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this franchise, etc. * * *"

Then followed a schedule of the rates for each particular purpose.

It was contended by the company in that suit that Section 12 of the ordinance constituted a contract and the question before the Supreme Court of Illinois and before this court was whether it constituted a contract or a mere regulation. Both the Supreme Court of Illinois and this court held in that case that it was not a contract but a regulation and this court said, referring to the language of the ordinance;

> "This, will be observed, is the language of command not of contract; of limitation on power, not a bargain giving power. The right to charge the inhabitants of the village for the water supplied to them resulted from the right to construct and maintain the system. Section 12 *was a regulation of the right.* There is no stipulation that it will be the only instance of regulation; that the power to do so is bargained away, and that the conditions that determined and justified it in 1888 would re-

> main standing, and continue to justify it through the changes of thirty years. It would require clearer language to authorize us to so hold it." (180 U. S., 630).

In the same case the Supreme Court of Illinois, speaking of this same Section 12, said;

> "This provision of the ordinance had no effect to establish a contract between the appellant company and the village that the individual inhabitants of the village should and would pay such rates for the period of 30 years, or any fixed period of time, *but was simply a declaration* on the part of the village that *such rates were reasonable.* The legal effect was to establish, *prima facie,* that the corporation, in order to discharge the duty it owed to the public, must supply the commodity it had been created to supply at the prices named in the ordinance. *It was a mode of regulating and enforcing the discharge of a legal duty,* not a proposition looking towards a contract. No contract was necessary to create an obligation on the part of the corporation to supply water at a reasonable rate, for that rested upon it as a duty." 53 N.E. 363

We call the court's attention to the fact that Section 12 of the ordinance in the Rogers Park case could more easily be construed as having been intended to fix the rate by contract for the entire franchise than the provision relied on in the case at bar because it provided that the company "shall charge" the rates therein named, *"during the existence of this franchise* * * *" In the case at bar there is no provision that the rates shall be charged for any length of time or during the life of the franchise as in the Rogers Park case, and hence it seems that it would be more unreasonable to hold this a contract and not a regulation than it would have been to so hold as to the ordinance in the Rogers Park case.

There is another rule of law that should be adverted to in connection with the construction of this provision of the ordinance, and that is, where a provision in an instrument

or statute or ordinance is susceptible of two constructions, one of which places it in opposition to and the other in harmony with the Constitution, the latter construction will be adopted.

Ennis Co. vs. City of Ennis, 105 Tex., 72,
12 C. J., pp. 539-540.

To construe this provision as a contract will be to declare it something that is forbidden by Section 17, Article 1, of the State Constitution, referred to above, and, furthermore, will hold that the city was doing something which it had not been authorized by the Legislature to do and as creating something that was absolutely null and void. On the other hand, to hold that it was a regulation not only places it in harmony with the Constitution of the State, but as the exercise of a power that the Legislature had specifically given to the city.

Therefore, we submit that the trial judge correctly held that the provision as to a five-cent fare was intended merely as a regulation. In view of the decisions of this court on this subject, and considering the constitutional provision of the State, which the court had to take judicial notice of, it seems to us that the court was warranted in so construing the provision by looking to the ordinance alone and that it is not susceptible of any other construction. But even if it can be held that the court could not say from the ordinance itself that it constituted a regulation and not a contract, then he had a right to take into consideration all the surrounding facts and circumstances and the subsequent conduct of the parties with reference to the said provision of the ordinance in arriving at the intention of the parties. If he did not have the right to find from the ordinance itself that this provision constituted a regulation, then he had a right to take into consideration the facts,

that, (1) the City had not been delegated any power by the State Legislature to make contracts as to street railway fares but that its only power with reference to street railways was to regulate them; (2) when the ordinance was passed on March 16, 1899, the two street railways, whose properties were consolidated by said ordinance, were then operating upon the streets of the city by virtue of consent theretofore given, (Transcript of Record, p. 118), and at that time and prior to the passage of the ordinance here in controversy there was an ordinance in effect providing for a five-cent fare with transfers to other lines of the *same company*, and that this ordinance has never been repealed, (Transcript of Record, p. 121), and that the fare provision here in controversy provides that the transfer should not be merely to the lines of the same company but "to or from either line to the other"; (3) in 1903, only a little more than four years after the passage of the franchise ordinance, the City of San Antonio passed an ordinance reducing the fare as to children under twelve years of age and as to school children under seventeen years of age from five cents to two and a half cents, and requiring the company to comply with the provisions of the State Half-Fare Law (Transcript of Record, pp. 16 and 119); (4) on July 24, 1907, the City of San Antonio passed an ordinance requiring the transportation of members of the police and fire departments free, (Transcript of Record, p. 120); (5) in July, 1917, when the Consolidation Ordinance was passed the city included in that ordinance a provision requiring the San Antonio Public Service Company to keep separate books and accounts as to the Transportation Department, showing the "income, costs of operation, maintenance and permanent improvements" of that department, and that such books should be kept open to the inspection of the representatives of the city.

It is shown from the record above referred to that prior to the passage of this ordinance two different street railway companies were operating in the city and that there was a five-cent fare ordinance in effect, but that it only required transfers to and from *lines of the same company*, whereas the fare provision of the franchise ordinance of March 16, 1899, here in controversy, provides for transfers "to or from either line to the other." Before the passage of the ordinance transfers were required only to and from the lines of the same company, but after its passage transfers had to be given not only to the lines of the same company but also the lines of the other company. Now it is a reasonable deduction from this fact that the intention of the city and the company in inserting the five-cent fare provision in the ordinance of March 16, 1899, was not to change the status that had theretofore existed between the city and the street railway companies from that of *regulation* to that of *contract* as to fares, but simply to provide for and require transfers to be given not only to lines of the same company but to the lines of the other company. There was already an ordinance in effect requiring a five-cent fare, and it was clearly not the purpose to destroy this ordinance but to leave it in full force except where it varied from said provision. The ordinance then in force regulating fares provided a penalty of not less than Twenty-five Dollars ($25.00) or more than Two Hundred Dollars ($200.00) for its violation, (Transcript of Record, p. 20), and it certainly was not the intention of the city to destroy the penalty provision of this ordinance by the reference to the fare in the franchise ordinance, but this would be its effect if construed as counsel for appellants contend it should be.

Furthermore, the court had a right to take into consideration the subsequent conduct of the city with reference to this ordinance as throwing light on whether it

regarded it as a regulation or a contract, and we find that in 1903 it passed a half-fare ordinance reducing the fare of children from five cents to two and a half cents and requiring the company to comply with the State Half-Fare Law; that in 1907 it passed an ordinance requiring the free transportation of policemen and firemen and in 1917, when the Consolidation Ordinance was passed, it required the San Antonio Public Service Company to keep separate books and accounts as to its Transportation Department showing the "income, cost of operation, maintenance and permanent improvements" of that department, and further required said company to keep said books open to the inspection of the representatives of the city, thus showing that the city considered even at that time that the status between it and the street railway company as to fares was not one of contract but one of regulation, because this would have been a useless requirement if the company had a contract authorizing it to charge a fixed fare of five-cents during the life of its franchise regardless of whether it made more or less than a fair rturn on its property. Counsel for appellants say the fare provision, under the decision of the Altgelt case, was not binding on the State, but was binding on the city. If it was binding on the city, then why did the city want to require the company to keep said books or leave them open to the inspection of the city. If it admitted that it was bound by a contract such books would have been of no concern to the city although they might have been to the State. The evidence clearly shows that the city regarded this as a regulation and not as a contract, and the court had a right to so find from such evidence even if he was not required to so construe the ordinance itself, and we take it that this is a finding this court would not review.

Even if the provision could be construed as a contract between City and Company, binding until action by the State, it became inoperative when the State passed the Half-Fare Law.

We do not see how it is possible to hold that the provision was ever at any time a contract but, if by any stretch of reasoning such holding can be made, it would seem that it must necessarily remain a contract only so long as the State had not seen fit to legislate with reference to such fares, and the State having taken up said subject by passing the Half-Fare Law in 1903, such a contract could not remain longer in force. To hold that such a provision was a contract and that it remained in force regardless of regulation by the State would put the street railway company in an anomalous condition. The Texas courts and this court have held that the Half-Fare Law is valid and that no matter what this ordinance may be it does not interfere with the power of the Legislature to legislate with reference to rates. If we undertook to defeat the Half-Fare Law on the ground that the company is not earning a fair return on its property the State would answer that the Half-Fare Law does not prevent us from raising our fares but simply provides that the fare for children shall be one-half of that for adults. Now, when we undertake to raise fares the city says "You cannot do this because you are bound by a contract." The appellants take the position in their brief that we might attack the State Half-Fare Law if we can show it is confiscatory, but we cannot avoid or contract with the city. (Brief, pp. 77-75). The result of this would be to have the city ordinance override the will of the Legislature—that very thing the Altgelt case held could not be done. If the city's contention that this provision is a contract should be upheld in this case, then the result of the opinion in this case and the Altgelt case would be that the company cannot defend against the State Half-

Fare Law or any other similar laws the Legislature may see fit to pass, because the city had no power to bind the State or to put the matter of fares beyond its control, but notwithstanding this fact, and the fact that the Legislature may require children to be carried at half-fare or workmen and other people to be carried at less than the regular fare during certain hours or may require the company to sell tickets at less than the cash fare or make other such regulations, still the company could not raise any fare above five cents because it had contracted with the city. It seems to us the position is too preposterous to require argument.

If it can possibly be held that this provision ever constituted a contract binding between the city and the company until the Legislature saw fit to enter the field of fixing rates of street car fares, then we see no reason why the rule applied by this court in Southern Railway Co. vs. Reid, 222 U. S., 424, to the effect that while states may make regulations as to interstate commerce in the absence of regulation by Congress, yet, when Congress once enters the field and exerts its authority, it takes all power in regard thereto away from the State. We do not wish to be understood as recognizing the proposition that the city may legislate in the absence of legislation by the State, because we think such a proposition entirely unsound as the City must derive its authority to legislate from the State, but we merely wish to call the court's attention to the anamolous and perilous position public service companies would be placed in by such construction as that contended for by appellants or by holding that such a provision as here involved is a contract as to rates notwithstanding the fact that it does not bind the State or prevent it from legislating on the same subject. It is a well settled proposition of law that a city ordinance is inferior to a state statute, and, if either statute or the ordinance must give way, that the ordinance is the one compelled to yield. Marquis vs. Tele-

phone Company, 154 N. W., 927; Carlton vs. Boudar, 88 S. E. (Va.), 174.

In this connection also see Milwaukee Ry. vs. Commission, 238 U. S., 179.

Even if the provision could be construed as a contract between City and Company at the time of its passage, the City has repealed and repudiated it by the passage of the Half-Fare City Ordinance, the ordinance compelling free transportation of firemen and policemen, and by other acts and is estopped from claiming it to be a contract.

The plaintiff set up these facts and alleged that if the provision was ever a contract it had been annulled by the city and the city was estopped by reason of such facts from now claiming that the same is a contract (Paragraph 10, Plaintiff's Petition, Transcript of Record, p. 9).

The passage of these ordinances by the city was undisputed. (Transcript of Record, pp. 119-120).

While we are confident that this court will never hold that the provision was a contract, yet, if such holding could be made, then it seems that it would be difficult to find a clearer repudiation of a contract by one of the parties to it than has been shown in the case at bar, and we submit that in any event the city is estopped from relying on a contract which it has so frequently repudiated and which it has so often treated as a regulation. It is apparent from the record in this case that even before the Altgelt case was filed the city had repudiated any idea that this provision was intended as a contract, if any such idea ever existed, and if it was a contract, then it breached and abrogated it by the passage of the Half-Fare Ordinance in 1903 and by ratifying the State Half-Fare Law and seeking to aid in its enforcement. If it was a contract, it further breached and abrogated it by the passage of the Police and Firemen's Ordinance and by the Consolidation Ordinance

of 1917, which required the company to keep books that clearly could be for no other purpose than to aid the city in regulating fares. We do not care to argue this proposition further, because it is apparent that the city has never at any time regarded the proposition as a contract but has changed the rate of fare whenever it saw fit to do so.

III.

CONSOLIDATION ORDINANCE OF 1917.

Counsel for appellants contended under Point III that even though the city was without authority and the five-cent fare provision in the ordinance of March 16, 1899, did not constitute a contract, yet it was under no such disability in 1917 when the Consolidation Ordinance was passed and therefore because of that ordinance appellee was bound.

Our reply to this is:

(1) The city was under the same disability as to lack of power and under the same prohibition by Section 17, Article 1, of the State Constitution in 1917 as it was in 1899.

(2) The Consolidation Ordinance of 1917 did not change the relation between the city and the company a particle, but left the relations between the San Antonio Public Service Company and the city exactly the same as they had theretofore been between the San Antonio Traction Company and the San Antonio Gas & Electric Company.

(3) The ordinance shows the city then had in mind that the right to regulate fares had not been contracted away and provisions were made therein looking to such regulation.

Taking these questions up in the order stated, we submit that Section 5 of Article 11 of the State Constitution, which

is spoken of by appellants as "The Home Rule Amendment", and which was adopted in 1912, made no change either as to the power of the city in reference to the matter under discussion or the prohibition under which it was resting; and the city had no further power in 1917 than it had in 1899. That portion of "The Home Rule Amendment" to the Constitution, which is applicable here, is copied by appellants on page 55 of their brief and is as follows:

> "Sec. 5. Cities having more than five thousand (5000) inhabitants may, by majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the legislature of this State."

It will be seen at a glance that this provision of the Constitution did not invest the city council with any other authority than that which is possessed at the time of the adoption thereof. It provided a method whereby city charters might be adopted or amended, *"by a majority vote of the qualified voters of said city."* In other words, it simply provided that after that date charters might be amended and certain powers given to the city council "by a majority vote of the qualified voters" instead of having to be amended, as theretofore, by the Legislature. Prior to the adoption of this amendment to the constitution cities had to have their charters amended by the Legislature and after that could amend them "by a majority vote of the qualified voters of the city"—but the Home Rule Amendment did not grant any additional powers to the city council itself. In this connection, we desire to call attention to the further fact that this "Home Rule Amendment" specifically provided that such charters or amendments adopted by the voters

should be subject to such limitations as might be prescribed by the Legislature and that they should not contain anything inconsistent with the Constitution or the general laws of the State.

It will be seen at once that even under this provision the qualified voters of the city could not have amended the charter so as to give the city council the power to contract with reference to fares because this would have been inconsistent with and was prohibited by Section 17, Article 1, of the State Constitution which is still in existence. Furthermore, if such power *could* have been given by a vote of the qualified voters it has not been shown, nor could it have been shown in this case that it *had* been given. On the contrary, the record affirmatively shows that in July, 1917, when the Consolidation Ordinance, on which counsel for appellants are relying under this point, was passed, the only provision in the charter which it is contended gave the city council any authority in respect to this matter was Section 95 which is identical with Section 99 of the old charter. In the statement of the evidence it is stipulated, after setting out the enactment of the Consolidation Ordinance and the facts with reference thereto that;

> "At that time (July, 1917), the City Charter gave the Commissioners power under Section 95: 'To exclusively control and regulate everything connected with street railways and to make such rules and regulations for the same as the Commissioners may deem necessary'." (Transcript of Record, p. 121).

No attempt was made on the trial of this case to show that by any amendment of the city charter the voters of the city had attempted to enlarge these powers in any way whatever, but on the contrary, the record affirmatively shows that the voters had not seen fit to enlarge these powers and that the only section giving the commissioners or council

power with reference to street railways was Section 95, which is identical with old Section 99 that was in existence in 1899. Furthermore, the Home Rule Amendment itself shows that the power could not have been given the commissioners by vote of the people with reference to fares as that was still prohibited by Section 17 of Article 1 of the State Constitution.

(2) It is difficult to understand how it can be contended that the ordinance of July 10, 1917, (which is set out in full on pp. 22-23 of the Transcript of Record) changed the status as to the regulation of fares or put the San Antonio Public Service Company in any other position as to its transportation department than that which had been occupied by the San Antonio Traction Company. It is apparent from the reading of the ordinance that it was the purpose of the city and the company that the San Antonio Public Service Company should assume exactly the same status as to its transportation department as the Traction Company had theretofore held. Section 2 of the ordinance, on which counsel for appellants so earnestly rely, simply says that:

> "All the limitations, duties, contracts, forfeitures and obligations imposed on or required of said companies at this time shall be imposed on and required of the San Antonio Public Service Company."

It is clear that it was not the purpose of this ordinance to change the terms or conditions of any existing contracts or regulations or obligations that the San Antonio Traction Company was at that time subject to, but simply to transfer these contracts, regulations, limitations or obligations, whatever they might be, to the San Antonio Public Service Company. If the San Antonio Traction Company was subject to a contract at that time the ordinance imposed that contract on the San Antonio Public Service Company. If

the San Antonio Traction Company was subject to regulations at that time, the ordinance imposed those regulations on the San Antonio Public Service Company, but it is apparent that the city was not undertaking to, nor was it the intention of the parties to change the nature of any regulation or obligation—to change any regulation into a contract or any contract into a regulation. If there were contracts before the passage of this ordinance, they remained contracts afterwards. If they were regulations before the passage of this ordinance, they remained regulations after its passage. The only effect was to transfer these contracts, limitations, regulations, forfeitures or obligations, whatever they might be, in the same form, from the shoulders of the San Antonio Traction Company to the San Antonio Public Service Company.

The trial judge in the court below was so clearly convinced from the reading of this Consolidation Ordinance of 1917 that it made no change in these matters but merely transferred the same regulations and obligations that had been imposed on the San Antonio Traction Company to the San Antonio Public Service Company, he did not even deem it necessary to discuss the question further in his opinion, and we do not feel that it needs further discussion here other than to call the court's attention to the language of the ordinance itself.

In this connection, however, we desire to call the court's attention to the fact that this ordinance shows that neither the city nor the company had in mind at that time that the city and the San Antonio Traction Company were bound by a contract fixing fares at five-cents.

Sections 3 and 4 show that the city had clearly in mind that its right to fix street railway fares had not been *contracted* away but that it still had the right to *regulate* same.

Section 3 specifically provides that the gas and electric department of said company shall be kept separate and dis-

tinct from the transportation department to the "same extent as if said branch of its service were still separate and distinct corporations."

Section 4 required the Company to keep separate books and accounts "showing the income, cost of operation, maintenance and permanent improvements of each of its plants, to-wit, its gas plant, its electric light plant and its *transportation* plant, which books shall be open to the inspection of the City Commissioners or their authorized representatives." (Transcript of Record, p. 23).

If the city and the company were bound by a contract as to the rate of street railway fares, fixing their fare at five cents for the balance of the life of the franchise, then why did this ordinance require that it should keep books and accounts showing the income, cost of operation, maintenance and permanent improvements not only as to its gas and electric departments, but also as to its transportation department, and why should these books be required to be open to the representatives of the city? If the city and company were bound by a contract as to fares, or it was intended by this ordinance they should in the future be bound by such a contract, why should the company be put to the expense of keeping all these items and why should it be required to show them to the city? If they were bound by a five-cent fare contract, as counsel for appellants contend, for the balance of the life of the franchise, or it was intended by this ordinance to so bind them, of what concern would it be to the city to know this information? It would be wholly immaterial to it whether the Company made or lost money, for in no event would the City Commissioners or Council have the power to regulate or change the fare. The very language of this section shows plainly that it was the purpose of the city to require books to be kept showing this information as to the transportation department as well as the other departments, and reserve

the right of inspecting them *in order that the city might have this information* so that it could *exercise* the power given it by its charter to *regulate* fares and that the parties understood at that time that this right had not been contracted away.

IV.

Reply to Fourth Point in appellants' brief (pp. 58-63) to the effect that the fare provision constituted at least a condition or limitation annexed to the grant that appellee is estopped to contest.

As a *dernier* resort appellants fall back on the proposition that, even though the provision does not constitute a contract, it is a condition or limitation subsequent—in other words, that, although it be true that the city and the company could not by contract fix the rate of fare because the city had not been authorized by the Legislature to make such a contract and because the making of such contract was prohibited by the Constitution, nevertheless, the city could attach a condition subsequent that would bind the company. We submit that there are at least four insuperable objections to this proposition advanced by appellants, viz:

(1) The trial court held that the provision was intended as a *regulation* and in addition to this being the proper construction of the ordinance itself, the other evidence in the case is ample to support this finding. We have discussed this point fully under the contention made by the city that the provision was intended as a contract *(supra,* p. 27), and the same reasoning applies here and need not be repeated, because if the provision was a *regulation,* as found by the trial court, it necessarily follows that it could not be a condition.

(2) Our courts do not look with favor on conditions subsequent, for, as said by the Supreme Court of this State in South Texas Telephone Co. vs. Huntington, 104 Tex., 350;

> "To constitute a condition subsequent upon which a forfeiture may be declared because of a failure in its performance, the language must be clear, and the condition must be created by express terms or by clear implication and it must be strictly construed. If there be doubt as to the meaning of the language, it will be construed as a covenant rather than as a condition."

To the same effect is the decision of the same court in Ryan vs. Porter, 61 Tex., 109, where it is said;

> "If the instrument will bear any reasonable construction that will defeat the springing of an implied condition subsequent, at law as in equity, that construction will be adopted. Estates upon implied condition subsequent cannot be created by deed, except where the terms of the grant will not admit of any other reasonable construction."
>
> It is much more reasonable to construe the provision either as a regulation or as a contract than as a condition subsequent. It does not state for how long the five-cents fare shall be charged and does not carry any penalty or indicate any intention of forfeiture and under the uniform rule as to the strict construction against conditions subsequent it would be impossible to so construe the provision under consideration.

(3) *That which was made illegal and which the city was prohibited by the State Constitution from doing directly, it cannot do indirectly.*

Section 17, Article 1, forbids the making of any such contract and therefore construed as a contract it would be illegal, but counsel for appellants take the position that, although the city could not make such a contract, it could reach the same end by calling it a condition subsequent. If this were true, then all statutes or constitutional pro-

visions prohibiting certain contracts could be evaded by construing such contracts as conditions subsequent—in other words, the parties could make a grant or contract that is forbidden by the constitution or by the statutes, and, when this contract was attacked in the courts as illegal, they could meet the objection by calling it a condition subsequent. We take it that, if parties undertook to do this by the plainest kind of English, they would make but little headway in the courts. For example, if a contract that was in violation of the anti-trust law, or any other State law, was made, the parties could not avoid the vice of illegality in it by saying, "This shall not be construed as a contract but shall be a condition subsequent." Such an attempt to evade the statute would be regarded as puerile. The thing that the constitution denounced, and that public policy denounces, is the fixing of a fare for a long period of time so that it cannot be changed or so that the governmental power of regulation is surrendered, and, whether this end is reached by contract or condition subsequent, it would be equally illegal.

It should be noted that the provision in question does not undertake to fix a maximum fare, but it says that the company "shall charge five cents for one continuous ride, etc. * * *" If it had said that the company should not charge exceeding five cents, there might be some plausibility in arguing that it left the city the right to lower the rate under proper conditions, but if this is a condition subsequent, then it must be binding on both parties and the city would violate it if it undertook to lower the fare below five cents no matter what return the company might be earning. Furthermore, if construed as a condition subsequent, it must be held that the company would have violated it if it had voluntarily reduced the fare to four cents, because the language of it is that the company *"shall charge five cents for one continuous ride* * * *" Such con-

dition does not imply a reservation of the city's right to lower the rate should the situation make a lower rate reasonable; on the contrary, the language of the provision precludes the idea that any such reservation was intended. The condition (if a condition) is, that the company shall charge a five cents fare; and that condition would be violated if the city should lower the fare. If the city holds the condition valid, and demands that it be enforced against the company, then the company has the legal right to require that the condition be enforced according to its terms, which are, that the company shall have a five-cents fare, all the time, and this would deprive the city of the right to lower the fare should the situation become such that a lower fare would be reasonable. But the city cannot, by contract, condition, or otherwise, deprive itself of its said right to lower the fare in a proper case, and it follows that the condition is invalid. If the company can be bound by the condition at all it can be bound only according to its terms; if the condition cannot be enforced according to its terms, then it cannot be binding on the company. The company cannot be bound by this provision, as a condition, to charge not exceeding a five-cents fare, if the city is not bound by it not to lower that rate of fare. Mr. Dillon in his work on Municipal Corporations (5th Ed.), Sec. 1229, says that conditions subsequent, if valid, are binding on the city as well as the company.

It would be no answer to the above argument to say that the city has not undertaken to lower the rate; it is sufficient that the city has the legal right to, and may, hereafter lower the rate. The existence of this right destroys the condition, for the reason that it makes the condition uninforcible and nullifies the right accruing under it to the company to charge a five-cents rate for the term of the franchise. Besides, the city has in fact nullified the

condition by passing the Half-Fare Ordinance and the policemen's Ordinance, etc.

(4) The city had no power to impose any such condition subsequent.

This point is directly decided by the Supreme Court of Texas in the case of Galveston Railway Co. vs. Galveston, 90 Tex., 398, where the Supreme Court reviewed numerous decisions throughout the country with reference to both steam and street railway companies, and held that in Texas, cities had no right to impose such a condition. Referring to the case of Taylor vs. Dunn, 80 Tex., 670, and to "The Appeal of the City of Pittsburg," 115 Pa. St., 4, the court said:

> "Both cases rest upon the sound proposition that a city may annex to its consent for the use of its streets terms or conditions which require the performance of a railway company of those things which are *within the power* of the municipal corporation to regulate and enforce against a corporation or individual occupying such streets with the city's consent, *and that no other terms can be prescribed by the city under such circumstances* * *" A city council having control over its streets by virtue of its charter, when called upon to give consent for a railroad company to build upon its streets, may prescribe terms which embrace the doing of all those things necessary to the preservation of the streets and crossings for the public use; however, this is not done by virtue of a power arising out of the right to deny consent to use the street, *but is the exercise of a power conferred by its charter*, which power might be as well exercised after the consent is given as at the time * * *"

In that case the court held that the statutes required the consent of the city before the railroad could go on its streets, and that the city had the power to absolutely refuse consent (404), and that the consent of the city was a condition precedent prescribed by the statute before the railwas company could go upon the streets of the city. In the

case at bar the constitutional provision, heretofore quoted, requires the consent of the city before a street railway company incorporated by the State can go upon its streets. This consent the city may give or refuse, but, as we have heretofore shown, the authority to go upon the streets of the city comes from the Legislature subject to the consent of the city. The procuring of this consent is a condition precedent to its going on the streets, but when the city gives this consent it can only affix such conditions to it as the Legislature has authorized it to affix, for, as said by the Supreme Court in the Galveston case above referred to;

> "But, to the condition precedent prescribed by the statute (that is, the consent of the city) the City of Galveston has attached a condition subsequent, the breach of which, it is claimed, has the effect to annul not only the consent of the city, but also to set aside and annul the right acquired under the laws of the State. In this case the railroad company was in possession of the streets of the City of Galveston under a grant by the State upon a condition precedent, which had been fulfilled; (i. e., the consent of the city had been obtained) to which the city answered, that, although this is true, the ordinance of the city prescribed a condition the breach of which destroyed the right of occupancy under the statute. This cannot be true unless the ordinance of the city is superior to the statute and the creature may become greater than the creator." (p. 413).

The construction we have put on the Galveston case is the same construction placed on it by Mr. Dillon in his work on Municipal Corporations (5th Ed.), Sec. 1229.

In the Galveston case referred to it was very clear that the city intended the clause in question as a condition subsequent, and that a forfeiture should follow. There was no ambiguity about the language of the provision, but the Supreme Court held that the city had not been authorized by its charter to annex any such conditions subsequent and that therefore it was null and void.

In the case at bar there is nothing in the language of the provision to indicate that it was intended as a limitation or condition subsequent, but, even if it can be held that such was the intention, then a complete reply is that the city was not authorized to annex any such condition and therefore if construed as a condition subsequent it would be void. The record in this case shows that the street railway companies were incorporated by the State for the purpose of owning and operating street railways in the city of San Antonio, (Transcript of Record, p. 118), and that the city gave its consent to go upon the streets prior to the enactment of the ordinance of March 16, 1899, and that said street railways were being operated on the streets of San Antonio prior to March 16, 1899. Having given its consent, it could annex only such conditions as its charter authorized it to annex, and it was not only not authorized by its charter, but was forbidden by the Constitution to annex any such condition as here contended for. We have reviewed the Texas cases cited under this point and believe we have shown that they can have no application to the case at bar. The city was not only without authority but was forbidden by the constitution to annex any such condition and the language of the provision does not justify a holding that it was intended as a condition subsequent.

V.

Reply to Appellants' Fifth Point (Brief, pp. 64-73).

This sub-division of appellants' brief presents nothing which is not covered by the points previously presented except perhaps the Master's suggestion of the proposition of law that, as the rate was reasonable when fixed by the ordinance of 1899, no relief could be granted the company even though, through changed conditions arising thereafter, it became unable to earn a fair return on its property under

said rate, if such conditions were brought about by circumstances over which the city had no control—in other words, as the increased cost of labor and material, necessary in operating the public utility company, was not brought about directly by the city itself, there could be no relief. Stated in different language, that an ordinance once reasonable is always reasonable, and a utility company can have no relief against it unless the conditions causing it to become unreasonable are brought about by the rate making body itself.

The only reference the trial judge saw fit to make to this contention in his opinion overruling it was that it was "not supported by direct authority." (Transcript of Record, p. 114). We do not believe such a proposition needs any further consideration here, but we will refer the court to the cases of Castle vs. Mason, 110 N. E., 463; Lincoln Gas Company vs. Lincoln, 250 U. S., 256; Darnell vs. Edwards, 244 U. S., 564; Knoxville vs. Water Company, 212 U. S., 15; San Diego Land Company vs. City, 174 U. S., 767; Municipal Gas Co. vs. Commission, 121 N. E. (N. Y.), 772.

A complete answer to the contention is made in the language of this court in the Lincoln Gas case, as follows:

> "Perhaps it *would go without saying*, but in our opinion the decree ought to be modified so as to permit complainant to make another application to the courts for relief against the *operation of the ordinance hereafter*, if it can show as a result of its practical test of the dollar rate since May 1, 1915, or upon evidence respecting values, cost of operation, and the current rates of return upon capital as they stand *at the time of the bringing of the suit* and are likely to continue thereafter, that the rate ordinance is confiscatory in its effect *under the new conditions*. It is a matter of common knowledge, that, owing principally to the world war, *the cost of labor and supplies of every kind have greatly advanced since the ordinance was adopted and since this cause was last heard in the court below*. And it is equally well known that annual returns upon capital

> and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and public utilities a few years ago furnishes no safe criterion for the present or for the future."

In the Knoxville case, 212 U. S., 15, it is also said;

> The precise subject of inquiry was *what would be the effect of the ordinance in the future?*"

It is well settled that in all rate cases the question is not what were the conditions at the time the ordinance was passed, but the conditions at the time of the inquiry.

As said by this court in Lincoln Gas Company vs. Lincoln, 233 U. S., 357-358, what the company was entitled to was "a fair return upon the value of the property *at the time of the inquiry.*"

If this contention suggested by the master and promptly disapproved by the trial judge, but here relied on by appellants, is correct, then, apparently, this court and the courts throughout the country have been trying rate cases on the wrong theory. The courts have uniformly, in the trial of rate cases, inquired into the conditions existing at the time of the trial—the questions as to the value of the property, what was a fair rate of return, etc., have all been determined as of the date of the trial. If the proposition of law here advanced be correct, then the courts have been laboring under great error, for they should have made their inquiries not as of the date of the trial but as of the date of the passage of the ordinance regulating the rate no matter how long before the trial such ordinance was passed, whether twenty or fifty years. We shall not discuss such a proposition further.

VI.

Under the Sixth Sub-division of appellants' brief (pp. 73-75) the remarkable contention is made that, if the company was not making a fair return on its property, it should have attacked the Half-Fare Statute and that under the decisions of the Texas courts and this court in the Altgelt case, on making that showing, it could defeat the operation of the State Half-Fare Law but that it cannot in any event interfere with what they claim to be "a contract of the city."

If this were true, then, as said by the Supreme Court of Texas in the Galveston case above referred to, "The creature would become greater than the creator."

The State Half-Fare Law does not limit the fare to any specific sum, but says that the fare for children shall be one-half that charged adults, and we anticipate that, if we had undertaken to attack the Half-Fare Law, the representatives of the State would have met us with the very sound proposition that the State statute is superior to a city ordinance and especially superior to any ordinance or any supposed contract which a city might have attempted to make without authority from the Legislature and in direct violation of the State Constitution. We take it that in such a suit the State would have said, and justly so, "If you are not making a fair return you should raise your fares to such a point as will bring a fair return. The State statute does not prevent you from doing this and when such raise is made, you are entitled under the State statute to raise the fare for children to not more than one-half of the new fare fixed for adults." We have no doubt that in such a suit the courts would have promptly denied relief and have held that the action of the State Legislature could not be made to yield to any action on the part of the city council. If the Altgelt case does not decide this, we are at a loss to know what it does decide.

We have discussed this matter further under the Second Point in this brief.

CONCLUSION.

The equities of this case are clearly with the appellee. Under the law and in equity and in good conscience the appellee is entitled to earn a fair return on the value of its property, and it is undisputed here that it is being denied this right. The master found that this was so clear from the evidence that it would not be disputed by the city, and this finding was not excepted to by appellants. The city is now seeking to deny the relief granted on the ground that it has a "contract" with appellee to charge only a five-cents fare notwithstanding the fact that the record shows, without dispute, that through all the years that intervened between 1899 and 1918 it regarded and treated the provision as a mere regulation which it could change at will—that in 1903 it passed a Half-Fare Ordinance reducing the fare for children to two and a half cents; that it ratified and helped to enforce the State Half-Fare Law; that in 1907 it passed the ordinance requiring the free transportation of policemen and firemen, and in the Consolidation Ordinance of 1917 it inserted the provision showing that it was still asserting the right of regulation. It is only when the company finds, after pocketing its losses for several years, that it cannot make anything like a fair return on its property, that the city conceives the idea that it has a contract. When the predecessor of this appellee was asserting in the Altgelt case that the provision was a contract, the city was not found rushing to aid in the enforcement of its sacred obligation (?), but had theretofore repudiated and was at that time repudiating the idea that the provision constituted a contract, and had theretofore asserted and was still asserting, and continued to assert until 1918, its right to regulate

the fare. If we can be accused of inconsistency, in now asserting what we believe to be the law in view of the Altgelt case and the numerous cases of the Supreme Court (most of which have been decided by this court since 1903) simply because the representatives of our client's predecessor contended in the Altgelt case that the provision was a contract, then we think we may at least be permitted to reply to appellants, not in Latin phrase, as resorted to by them, but in the plain old English saying that "People who live in glass houses should not throw stones." In asserting the propositions here contended for, we are quite satisfied that we are following the law as laid down by this court in the Altgelt case and in the numerous cases decided since that time and which have very much clarified and elaborated the law of rate regulation since the time the Altgelt case arose. The city has changed front, after treating this provision as a regulation for eighteen years, not in order to follow the law, but in defiance of those decisions and it has no standing at law or in equity.

We respectfully submit that the judgment of the trial court should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 263.—October Term, 1920.

City of San Antonio et al., Appellants, *vs.* San Antonio Public Service Company. } Appeal from the District Court of the United States for the Western District of Texas.

[April 11, 1921.]

Mr. Chief Justice White delivered the opinion of the Court.

The decree below enjoined the city of San Antonio from enforcing a five cents fare against the Public Service Company, operating street railway lines in that city, on the ground that the right to enforce such rate was not secured to the city by contract and such enforcement was beyond the power of the city because of the confiscation of the property of the railway company which would result in violation of the Fourteenth Amendment to the Constitution of the United States.

The consideration we must give the subject will be clarified by outlining the origin and development of the controversy.

In March, 1899, the city of San Antonio by ordinance extended to July 1, 1940, "the rights, privileges and franchises heretofore granted to and existing in the San Antonio Gas Company, Mutual Electric Light Company, San Antonio Street Railway Company and the San Antonio Edison Company." The ordinance provided, among other things, that the two companies last named, which operated street railways in the city "shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other."

In April, 1900, all the property of the two railway companies was sold under a decree of a state court to the San Antonio Traction Company and that company, with the approval of the city, thereafter controlled and carried on both lines.

In 1903 the State enacted a half-fare law, making it the duty of the Traction Company to carry school children and students for half fare, and subsequently an ordinance was passed by the city in furtherance of this law. The company refusing to carry out this legislation on the ground that it impaired the obligation of its contract as to rate of fare resulting from the ordinance of 1899, in violation of the constitutions of the State and of the United States, a suit by mandamus to compel it to do so was begun by an individual, and from a ruling adverse to the company's contention, the case was taken to the Court of Civil Appeals. That court held that it was unnecessary to consider whether the rate requirement was a contract because, as it was adopted long after the provision of the state constitution, that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the legislature or created under its authority shall be subject to the control thereof," it was necessarily to that extent restricted, and therefore left the State free, within the limits of the restriction, to exert the authority to regulate. As a result, the half-fare law was upheld, obviously upon the conclusion that it was within the power to regulate as restricted by the constitutional provision (Tex. Civ. App., 81 S. W. 106).

Because of the Federal question the case was brought to this court and the decree was affirmed substantially on the ground which had controlled the decision below. In addition, however, the court was careful to point out that the state constitution prohibited a rate regulation which was confiscatory, but that in view of the absence of all averment that the rate in question was confiscatory, it was unnecessary to deal with that subject. *San Antonio Traction Co.* v. *Altgelt*, 200 U. S. 304.

Presumably under the power to regulate as thus established the city thereafter passed, and the Traction Company carried out, an ordinance imposing the duty of free transportation of policemen and firemen.

In 1912 the state constitution was amended so as to authorize cities having more than 5,000 inhabitants, by vote of their electors, to amend their charters or adopt new ones, subject to the limitation that the charters should not contain any provision inconsistent with the constitution or general laws of the State.

In the meantime the two companies, gas and electric, dealt with in the ordinance of 1899, were consolidated and became the San Antonio Gas and Electric Company, and in 1917 the defendant in error, the San Antonio Public Service Company, petitioned the city government to consent to its acquisition of all the rights and property of the San Antonio Traction Company and of the San Antonio Gas and Electric Company, thus proposing to bring under one control the four corporations dealt with in the ordinance of 1899. The city consented by an ordinance which expressly subjected the Public Service Company to all the limitations, duties and obligations which rested upon the Traction Company and the Gas and Electric Company. The ordinance further provided that:

"In accepting the provisions of this ordinance the San Antonio Public Service Company agrees that the City shall hereafter have the right to pass all ordinances not in direct conflict with the laws of this State fixing and regulating the rates, prices and terms at which gas and electricity shall be furnished for public and private purposes to the city and its inhabitants."

This was followed by provisions requiring the keeping of such accounts by the Public Service Company in its gas and electric departments as would enable the city to exercise the power to fix rates as to gas and electricity. The ordinance having been accepted by the Public Service Company, the consolidation was accomplished.

At and for a long time prior to the consolidation the penal code of the city contained a provision, accompanied by a penalty for its violation, forbidding, except during certain hours of the night, the charging of more than a five cents fare within the city limits. Shortly after the approval of the consolidation another ordinance was passed forbidding and penalizing any person, firm or corporation, enjoying franchises within the city limits, or their agents or employees, from charging more than the rate then charged and collected, without obtaining the permission of the city. In conformity with this last mentioned ordinance the Public Service Company, in August, 1918, applied to the city for permission to increase its rate of fare from five to six cents, based upon the ground that although the five cents fare was remunerative at the time it was fixed, it had, by the increase in cost of operation in

practically every department, become wholly insufficient for that purpose and could not be continued without confiscating the property of the company. After a hearing the city, by an ordinance reciting that as the company was bound by the forty-year franchise granted in 1899 to charge five cents fare, the city did not feel authorized nor called upon to set it aside, and furthermore that the hearing had shown no necessity for the change in rate asked, refused the company's request, at the same time prohibiting, under a penalty which was stated, any person, firm, or corporation operating any street railway within or partly within the city from charging more than a five cents fare.

Thereupon the company commenced this suit by filing its bill to enjoin the city from enforcing the five cents fare ordinance. The bill, after alleging the adequacy of the rate of five cents when originally fixed in 1899, contained the amplest averments concerning its present confiscatory character. The prayer was for a temporary injunction restraining the enforcement of the five cents fare ordinances and from interfering with the company in putting in a seven cents fare instead, and from enforcing the ordinances which forbade a change of fare. It was prayed that if the company was not permitted to put in effect the seven cents fare, the court would itself establish that rate, or such other as it might find necessary to enable the company to pay its operating expenses and to earn a reasonable sum on its investment, and that a permanent injunction securing the results prayed be awarded.

The city moved to dismiss the bill for want of jurisdiction because it presented no substantial Federal question, as it showed on its face that the parties were bound by the five cents fare provision of the franchise ordinance as a contract subject to be enforced even though the rate was confiscatory, and moreover because the bill otherwise stated no ground for equitable relief. The court overruled the motion. It reviewed the history of the case and decided that in view of the controversy as to contract growing out of the enforcement of the half-fare law terminated by the ruling of this court in the *Altgelt* case, as well as of all the subsequent dealings between the parties, the existence of a contract as to the five cents fare was not established, and hence, the attempt to enforce it, because of the confiscation to result, gave a cause of

action under the Constitution of the United States. 257 Fed. 467.

The city then answered reiterating the grounds of its previous challenge to the jurisdiction and asserting that the franchise ordinance rate was based upon a contract resulting from that ordinance and from the action taken at the time and in furtherance of the consolidation. It further asserted an estoppel to deny the contract arising from various acts of the city and the corporation or its predecessors from the time of the ordinance in 1899 to the bringing of the suit in 1918. Moreover, disputing the confiscatory character of the five cents fare, it claimed the right to compel its continued exaction in virtue of its general governmental authority to regulate the fares of street railway companies.

The case was referred to a master to report on the facts and the law. Before the master, a hearing was had, followed by an elaborate report on both subjects. As the action of the court overruling the exception to its jurisdiction had adversely disposed of the question of the existence of the contract concerning the five cents fare, the master put that subject out of view and therefore reported only on the facts as to the confiscatory character of the five cents rate and of the power of the court, under the assumption that it was confiscatory, to restrain its enforcement.

A few words from the report will suffice to make manifest the conclusion of the master. He said: "The rate prescribed by the ordinance is insufficient, because of the changed conditions since the rate was fixed twenty years ago, to enable the company to earn a fair return; but I have reached the conclusion that to admit the contention of the company would be for the Court to exercise a power it does not possess; . . . A rate, reasonable when fixed, does not become unreasonable, from the judicial point of view, because of changed conditions."

Although the Public Service Company excepted to the conclusion of law thus stated and to some of the separate conclusions of fact made by the master, no exception whatever to the report was made by the city, and the case therefore went to the court upon the admitted confiscatory character of the rate, upon the question of contract, and upon the power of the court, if no such contract existed, to restrain the confiscation which would result from giving effect to the rate. Adhering to its previous ruling the court de-

clared that it had jurisdiction to prevent the admitted confiscation which would result from the five cents rate. Concluding, however, that as the court was not a primary rate-making authority it would not fix a reasonable rate to replace the five cents rate the enforcement of which would be enjoined and expressing the hope that the parties might agree upon such a rate, it announced that it would postpone shaping the final decree for that purpose.

Some weeks afterward the final decree was entered. It enjoined the city from interfering with the complainant in substituting a seven cents fare for the five cents fare and besides enjoined the city from enforcing the various ordinances complained of in the bill prohibiting and punishing the charging of a higher rate than five cents. The decree reserved, however, the right to the city to ask relief whenever because of a change in conditions the five cents fare should cease to be confiscatory. In addition, the enforcement of the city ordinance imposing the half-fare rate for school children was enjoined, although the continued enforcement of the state half-fare law, which had been upheld in the *Altgelt* case, was expressly declared not to be restrained. On the direct appeal of the city because of the constitutional question involved, we are called upon, as at the outset stated, to determine whether error was committed in the decree thus rendered.

That in view of the admitted fact of confiscation the court had power to deal with the subject, we are of opinion is too clear for anything but statement. And we think it is equally clear that as the right to regulate gave no power whatever to violate the Constitution by enforcing a confiscatory rate, a result which could only be sustained as a consequence of the duty to pay such rate arising from the obligations of a contract, it follows that the solitary question to be considered is whether a contract existed empowering the city to enforce the confiscatory rate.

Primarily the answer to that question must depend upon whether the ordinance of 1899 fixing the five cents rate was a contract. That it was not and could not be, we are of opinion is the necessary result of the provision of Section 17, Article I, of the state constitution, existing in 1899, prohibiting "any irrevocable or uncontrollable grant of special privileges," etc., when considered in the light of the irrevocable and uncontrollable elements which must necessarily inhere in the ordinance of 1899 to give it the

contract consequence relied upon. Indeed this result is persuasively established by the ruling in the *Altgelt* case, to the effect that if the contract right were conceded there would, in view of the constitutional restriction, be such an inevitable conflict between that right and the dominant power to regulate as to render the contract right inoperative and therefore to cause it to perish from the mere fact of admitting its conflict with the authority to regulate.

But it is urged that as by the amendment to the state constitution of 1912 the city was endowed with authority broad enough to enable it to contract in granting a street railway franchise concerning the rate of fare to be charged, disenthralled from the limitation of Section 17, Article I, of the state constitution, it follows that the franchise ordinance must after that date be viewed as such a contract and treated accordingly. But as no contract between the city and the Traction Company made after the constitutional amendment in 1912 concerning the fare in question is referred to, it is plain that even if the proposition as to power of the city after 1912 be, for the sake of the argument, conceded, it is irrelevant to the case we are considering.

And this is true also of the suggestion made in argument, that although no contract was possible under the constitutional restriction which would bind the city not to lower the rate, nevertheless there was a unilateral contract or condition resulting from the granting of the franchise which bound the railway company to the franchise rate, since again there is not the slightest suggestion of any attempt on the part of the parties consciously to produce such a condition. But besides, the error underlying the proposition is not far to seek. The duty of an owner of private property used for the public service to charge only a reasonable rate and thus respect the authority of government to regulate in the public interest, and of government to regulate by fixing such a reasonable rate as will safeguard the rights of private ownership, are interdependent and reciprocal. Where, however, the right to contract exists and the parties, the public on the one hand and the private on the other, do so contract, the law of the contract governs both the duty of the private owner and the governmental power to regulate. Where, therefore, as in the case supposed in the argument, the regulating power of government being wholly uncontrolled by contract, it would follow that that power would be re-

quired to be exerted and hence the supposed condition operating upon the private owner would be nugatory. Such a case really presents no question of a condition, since it resolves itself into a mere issue of the exercise by government of its regulatory power.

Further, however, it is urged that, as at the time of the consolidation in 1917 the powers of the city were not limited by the constitutional provision referred to, the necessary effect of the obligations which the Public Service Company came under was to convert the five cents fare ordinance into a contract conferring the right to enforce it even though confiscatory. But that question rests upon mere implications, as no express provision to that effect is pointed out. Moreover, its entire want of merit not only results from that fact but from the unwarranted character of the implications upon which it is based. They proceed upon assumptions that, because the city exacted as a condition for consenting to the consolidation, that the existing obligations and duties of the corporations should be preserved, a contract as to the five cents fare arose. The error of the proposition in all its aspects is equally apparent from a broader view, since from the date of the final decision in the *Altgelt* case up to the time when the contention as to confiscation resulting from the changed conditions arose, the acts and dealings of the parties unmistakably indicated the purpose to exert the authority derived from the power to regulate, to the exclusion of the limitations resulting from the right of contract which had been unsuccessfully asserted by the Traction Company in the Altgelt litigation. This deduction arises not only from the exertion by the city, after the finality of the Altgelt litigation, of the power to compel the carrying of policemen and firemen without charge, but also from the general limitations expressed in ordinances making no reference whatever to contract rights, and asserting the right of the city to give or not to give consent to a change of rate.

In fact, the city ordinance expressing the consent to the consolidation makes this clear, since having, in the second section, imposed upon the Public Service Company "all the limitations, duties, contracts, forfeitures and obligations imposed on or required of either of said companies at this time," yet expressly, in the third section, stipulated for the right of the city to regulate the charges for the gas and electric services and imposed upon the

Public Service Company the duty of keeping the accounts as to such services in such a manner as to enable this to be done. Light is necessarily thrown on the purpose of this provision by considering that the right of the Public Service Company to assert that the maximum rates fixed by the ordinance of 1899 in favor of the gas and electric companies were contracts limiting the power of the city to regulate, had not been determined adversely to those companies, as had been done as to the Traction Company by the *Altgelt* case,—a view the force of which will be felt by recalling that by the amendment to the city's charter which we have stated the constitutional limitation which led to the deflection of the contract clause in the *Altgelt* case was no longer applicable.

The bold contrast between the ordinance referred to and the statement made by the city in the ordinance refusing the increase in rate to meet the confiscation, because of the assumed restraint put by an existing contract, tends to throw abundant light on the situation. The fact is, that all the contentions of the city as to implication of contract as to the 1899 rates but illustrate the plainly erroneous theory upon which the entire argument for the city proceeds, that is, that limitations by contract upon the power of government to regulate the rates to be charged by a public service corporation are to be implied for the purpose of sustaining the confiscation of private property. *Home Telephone Co.* v. *Los Angeles*, 211 U. S. 265, 273, and cases cited; *Milwaukee Electric Railway Co.* v. *Wisconsin R. R. Commission*, 238 U. S. 174, 180.

Affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.